MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AUTHORIZE THE DEDICATION OF STREETS IN PROCEEDINGS. (GSC 229) S. B. 67

The General Statutes Commission has carefully considered this bill and has worked with several drafts before arriving at this language.

The problem was raised initially by a series of letters from the Honorable W. E. Church, then Clerk of Superior Court in Forsyth County.

Mr. Church pointed out that G. S. 1-339.9(b) presently permits the court in a proceeding (where the court has signed an order for the sale of real property) to subdivide the land, dedicating to the public such portions of the land as is necessary for highways, streets, alleys and other public uses.

§ **1-339.9. Sale as a whole or in parts.**—(a) When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the judge or clerk of the superior court having jurisdiction may direct specifically

(1) That it be sold as a whole, or
(2) That it be sold in designated parts, or
(3) That it be offered for sale by each method, and then sold by the method which produces the highest price.

(b) When real property to be sold has not been subdivided but is of such nature that it may be advantageously subdivided for sale, the judge or clerk having jurisdiction may authorize the subdivision thereof and the dedication to the public of such portions thereof as are necessary or advisable for public highways, streets, alleys, or other public purposes.

(c) When an order of sale of such real or personal property as is described in subsection (a) of this section makes no specific provision for the sale of the property as a whole or in parts, the person authorized to make the sale has authority in his discretion to sell the property by whichever method described in subsection (a) of this section he deems most advantageous. (1949, c. 719, s. 1.)

There appears to be no statutory authority for the dedication of land for public highways in a partition proceeding where no portion of the land is ordered sold. In a street partition proceeding wherein land is sub-divided, under the law today there can be no dedication of property to public uses unless all tenants in common authorize the dedication. Agreement by all the tenants in common to dedicate land to public uses i.e. highway right-of-way etc., is effective only if all are sui juris. If one is an incompetent or a minor, then the dedication would be ineffective.

This rule apparently would hold true even though the dedication to public uses, i.e. a public highway, would inure to the

benefit of all tenants in common.

Further disadvantages to our existing rule are evident when one considers that the Highway Commission will not generally take over an existing road as a public road unless there is a 60 foot right of way dedicated to public use. The interests of lien creditors of a tenant in common could further complicate matters.

Mr. Church's initial suggestions have resulted in this bill. As added protections for minors and incompetents, this bill requires that a Superior Court judge approve any proposed dedication which will affect any interest of a minor or incompetent.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AUTHORIZE AND MAKE UNIFORM THE PROCEDURE MAKING A GIFT OF ALL OR A PART OF A HUMAN BODY AFTER DEATH FOR SPECIFIED PURPOSES (GSC 256).

The General Statutes Commission has considered the Uniform Anatomical Gift Act with the closest scrutiny and has made a very few changes to the Uniform Act to ensure its workability in North Carolina. Those few changes were made only after long and serious discussion of the values involved. The Commission urges that this Act be enacted without further change at this time in the interest of uniformity throughout the states and the rapid advancement of medical science in North Carolina.

Set out below is the text of the Act with extracts from the prefatory note and commentary prepared for the Uniform Act by the distinguished panel of doctors and lawyers who drafted the Act. Notes as to any North Carolina adaptation are included.

UNIFORM ANATOMICAL GIFT ACT

Prefatory Note

Human bodies and parts thereof are used in many aspects of medical science, including teaching, research, therapy and transplantation. It is a rapidly expanding branch of medical technology. Transplantation of parts may involve skin grafts, bones, blood, corneas, kidneys, livers, arteries and even hearts. It is said that 6,000 to 10,000 lives could be saved each year by renal transplants if a sufficient supply of kidneys were available.

Transplantation may be effected within narrow limits from one living person to another living person. In such case, all that is required is an appropriate "informed consent" authorizing the surgical removal on the one hand, and the implantation on the other. Tissues and organs from the dead can also be used to bring health and years of life to the living. From this source the potential supply is very great. But, if utilization of bodies and parts of bodies is to be effectuated, a number of competing interests in a dead body must be harmonized, and several troublesome legal questions must be answered.

The principal competing interests are: (1) the wishes of the deceased during his lifetime concerning the disposition of his body; (2) the desires of the surviving spouse or next of kin; (3) the interest of the state in determining by autopsy, the cause of death in cases involving crime or violence; (4) the need of autopsy to determine the cause of death when private legal rights are dependent upon such cause; and (5) the need of society for bodies, tissues and organs for medical education, research, therapy and transplantation. These interests compete with one another to a greater or less extent and this creates problems.

The principal legal questions arising from these various interests are: (1) who may during his lifetime make a legally effective gift of his body or a part thereof; (2) what is the right of the next of kin, either to set aside the decedent's expressed wishes, or themselves to make the anatomical gifts from the dead body; (3) who may legally become donees of anatomical gifts; (4) for what purposes may such gifts be made; (5) how may gifts be made, can it be done by will, by writing, by a card carried on the person, or by telegraphic or recorded telephonic communication; (6) how may a gift be revoked by the donor during his lifetime; (7) what are the rights of survivors in the body after removal of donated parts; (8) what protection from legal liability should be afforded to surgeons and others involved in carrying out anatomical gifts; (9) should such protection be afforded regardless of the state in which the document of gift is executed; (10) what should the effect of an anatomical gift be in case of

conflict with laws concerning autopsies; (11) should the time of death be defined by law in any way; (12) should the interest in preserving life by the physician in charge of a decedent preclude him from participating in the transplant procedure by which donated tissues or organs are transferred to a new host. These are the principal legal questions that should be covered in an anatomical gift act. The Uniform Anatomical Gift Act covers them.

The laws now on the statute books do not, in general, deal with these legal questions in a complete or adequate manner. The laws are a confusing mixture of old common law dating back to the seventeenth century and state statutes that have been enacted from time to time. Some 39 states and the District of Columbia have donation statutes that deal in a variety of ways with some, but by no means all, of the above listed legal questions. Four other states have statutes providing for the gift of eyes only.

These statutes differ from each other in a variety of respects, both as to content and coverage. They differ in their enumeration of permissible donees (some require that donees be specified, others permit gifts to be made to any hospital or physician in charge at death); they vary as to acceptable purposes for anatomical gifts (some, for example, do not include licensed tissue banks); they prescribe a variety of minimum ages for the donors; others differ as to the manner of execution of gifts and the manner of revocation. Some require delivery of the instrument of gift or filing in a public office, or both, as a condition of validity; others make no such provision. Since the statutes differ in important respects, a gift adequate in one state may or may not protect the surgeon in another state who relies upon the law in effect where the transplant takes place. In short, both the common law and the present statutory picture is one of confusion, diversity and inadequacy. This tends to discourage anatomical gifts and to create difficulties for physicians, especially for transplant surgeons.

In view of the foregoing, the need of a comprehensive act and an act applicable in all states is apparent. The Uniform Anatomical Gift Act herewith presented by the National Conference of Commissioners on Uniform State Laws carefully weighs the numerous conflicting interests and legal problems. Wherever adopted it will encourage the making of anatomical gifts, thus facilitating therapy involving such procedures. When generally adopted, even if the place of death, or the residence of the donor, or the place of use of the gift occurs in a state other than that of the execution of the gift, uncertainty as to the applicable law will be eliminated and all parties will be protected. At the same time the Act will serve the needs of the several conflicting interests in a manner consistent with prevailing customs and desires in this country respecting dignified disposition of dead bodies. It will provide a useful and uniform legal environment throughout the country for this new frontier of modern medicine.

1 A BILL TO BE ENTITLED AN ACT TO AUTHORIZE AND MAKE UNIFORM
2 THE PROCEDURE MAKING A GIFT OF ALL OR PART OF A HUMAN BODY
3 AFTER DEATH FOR SPECIFIED PURPOSES.
4 The General Assembly of North Carolina do enact:
5 Section 1. Chapter 90 of the General Statutes is hereby
6 amended by inserting the following new Article 15A immediately
7 after Article 15 thereof and immediately before Article 16
8 thereof:
9 "Article 15A.
10 "Uniform Anatomical Gift Act.
11 "§90-220.1. Definitions. As used in this Act:
12 (1) 'Bank or storage facility' means a facility licensed,
13 accredited, or approved under the laws of any state for storage
14 or distribution of human bodies or parts thereof.
15 (2) 'Decedent' means a deceased individual and includes
16 a stillborn infant or fetus.

17 (3) 'Donor' means an individual who makes a gift of all
18 or part of his body.
19 (4) 'Hospital' means a hospital licensed, accredited, or
20 approved under the laws of any state and a hospital operated by
21 the United States government, a state, or a subdivision thereof,
22 although not required to be licensed under state laws.
23 (5) 'Part' means organs, tissues, eyes, bones, arteries,

1 blood, other fluids and any other portions of a human body.
2 (6) 'Person' means an individual, corporation, govern-
3 ment or governmental subdivision or agency, business trust,
4 estate, trust, partnership or association, or any other legal
5 entity.
6 (7) 'Physician' or 'surgeon' means a physician or sur-
7 geon licensed or authorized to practice under the laws of any
8 state.
9 (8) 'State' includes any state, district, commonwealth,
10 territory, insular possession, and any other area subject to
11 the legislative authority of the United States of America.

Comment

Subsection (f) is taken verbatim from the Uniform Statutory Construction Act, section 26 (4). In any state that has adopted the Uniform Act or its equivalent, this subsection will be unnecessary.

Subsection (h) is taken from section 26 (9) of the Uniform Statutory Construction Act.

In line 14 of G. S. 90-220.1 (1) the words "or distribution" are inserted after the word, "storage". This clarification was added to the Uniform Act so as to remove any possible doubt as to what constitutes a bank or storage facility within the Act. Specifically, this was altered to insure that the Act adequately covered eye and blood bank facilities.

12 "§90-220.2. Persons who may execute an anatomical gift.
13 (a) Any individual of sound mind and 18 years of age or more
14 may give all or any part of his body for any purpose specified
15 in G. S. 90-220.3, the gift to take effect upon death.
16 "(b) Any of the following persons, in order of priority
17 stated, when persons in prior classes are not available at the
18 time of death, and in the absence of actual notice of contrary
19 indications by the decedent or actual notice of opposition by
20 a member of the same or a prior class, may give all or any part
21 of the decedent's body for any purpose specified in G. S. 90-
22 220.3:
23 (1) The spouse,
24 (2) An adult son or daughter,
25 (3) Either parent,
26 (4) An adult brother or sister,
27 (5) A guardian of the person of the decedent at the
28 time of his death,

1 (6) Any other person authorized or under obligation to
2 dispose of the body.
3 The persons authorized by this subsection may make the gift
4 after or immediately before death.
5 "(c) If the donee has actual notice of contrary indications
6 by the decedent or that a gift by a member of a class is opposed
7 by a member of the same or a prior class, the donee shall not
8 accept the gift.
9 "(d) A gift of all or part of a body authorizes any examin-
10 ation necessary to assure medical acceptability of the gift for
11 the purposes intended.
12 "(e) The rights of the donee created by the gift are para-
13 mount to the rights of others except as provided by G. S. 90-
14 220.7(d).

Comment

Existing state statutes differ in their respective standards establishing the donor's competence to execute an anatomical gift.

This section changes the law of North Carolina in two important respects. Under the present law, G. S. 90-216.1, a donor must be capable of validly making a will in this State. The present law contains no provision for one other than a decedent to make an anatomical gift. The proposed Act provides for gifts by decedents age 18 and older and by close relatives with a specified order of priority. Subsection C restricts the donee such that he may not accept an anatomical gift where he has actual notice of opposition to the gift by the decedent or a relative of the same class as the one making the gift. The General Statutes Commission inserted the word "adult" at line 24 and at line 26 on the basis that it was necessary to expressly restrict the right to make an anatomical gift to adult relatives.

"Competence to execute a will" is used as the standard in ten states. "Legal age" and sound mind is required in five states. "Twenty-one years and sound mind" is the stated standard in the statutes of ten states. In four states a person who is eighteen years of age or older may make the gift, and in six states "any person" may do so. One state requires twenty-one years accompanied by a certificate of a physician that the donor is "of sound mind and not under the influence of narcotic drugs."

To minimize confusion there is merit in having a uniform provision throughout the country. Also it is desirable to enlarge the class of possible donors as much as possible. Subsection (a) of Section 2, providing that any person of sound mind and 18 years or more of age may execute a gift, will afford both nationwide uniformity and a desirable enlargement of the class of donors. Persons 18 years of age or more are of sufficient maturity to make the required decisions and the Uniform Act takes advantage of this fact.

Subsection (b) spells out the right of survivors to make the gift. Taking into account the very limited time available following death for the successful removal of such critical tissues as the kidney, the liver and the heart, it seems desirable to eliminate all possible question by specifically stating the rights of and the priorities among the survivors.

Also, Section 2 (b) provides for the effect of indicated objections by the decedent, and differences of view among the survivors. Finally it authorizes the survivors to execute the necessary documents even prior to death. In view of the fact that persons under 18 years of age are excluded from subsection (a), it is especially desirable to cover with care the status of survivors, so younger decedents may be included.

Subsection (d) is added at the suggestion of members of the medical profession who regard a post mortem examination, to the extent necessary to ascertain freedom from disease that might cause injury to the new host for transplanted parts, as essential to good medical practice.

Subsection (e) recognizes and gives legal effect to the right of the individual to dispose of his own body without subsequent veto by others.

15 "§90-220.3. Persons who may become donees; purposes for
16 which anatomical gifts may be made. The following persons may
17 become donees of gifts of bodies or parts thereof for the pur-
18 poses stated:
19 (1) Any hospital, surgeon, or physician, for medical or
20 dental education, research, advancement of medical or dental
21 science, therapy, or transplantation; or
22 (2) Any accredited medical or dental school, college or
23 university for education, research, advancement of medical or
24 dental science, or therapy; or
25 (3) Any bank or storage facility, for medical or dental
26 education, research, advancement of medical or dental science,
27 therapy, or transplantation; or
28 (4) Any specified individual for therapy or transplan-
1 tation needed by him.

Comment

Existing state statutes reveal great diversity of provisions concerning possible donees and the purposes for which anatomical gifts may be made.

As to donees, the lists include licensed hospitals, storage banks, teaching institutions, universities, colleges, medical schools, state public health and anatomy boards, and institutions approved by the state department of health. Some of the statutes are detailed and comprehensive. Others are limited, brief and general. A few do not seek in any way to name or limit the donees. The Uniform Act attempts to achieve a maximum of clarity and precision by carefully naming the permissible donees.

The statutes in a few states specify that no donor shall ask compensation and no donee shall receive it. Several statutes provide that storage banks shall be non-profit organizations. On the other hand, most of the states have chosen not to deal with this question. The Uniform Act follows the latter course in this regard.

As to purposes, again there is great diversity among the statutes. The list of purposes includes teaching, research, advancement of medical science, therapy, transplantation, rehabilitation, and scientific uses. Again some of the statutes are detailed, and others are brief and general. A few statutes contain no limitation whatsoever - merely naming the donees, thus assuring that gifts will not be made to undesirable persons or organizations, and then they are inclusive in naming the purposes in broad terms, thus assuring flexibility. The Uniform Act follows this course.

2 "§90-220.4. Manner of executing anatomical gifts.—(a)
3 A gift of all or part of the body under G. S. 90-220.2(a) may
4 be made by will. The gift becomes effective upon the death of
5 the testator without waiting for probate. If the will is not

6 probated, or if it is declared invalid for testamentary pur-
7 poses, the gift, to the extent that it has been acted upon in
8 good faith, is nevertheless valid and effective.
9 "(b) A gift of all or part of the body under G. S. 90-
10 220.2(a) may also be made by document other than a will. The
11 gift becomes effective upon the death of the donor. The docu-
12 ment, which may be a card designed to be carried on the person,
13 must be signed by the donor in the presence of two witnesses
14 who must sign the document in his presence. If the donor can-
15 not sign, the document may be signed for him at his direction
16 and in his presence and the presence of two witnesses who must
17 sign the document in his presence. Delivery of the document
18 of gift during the donor's lifetime is not necessary to make
19 the gift valid.
20 "(c) The gift may be made to a specified donee or with-
21 out specifying a donee. If the latter, the gift may be accepted
22 by the attending physician as donee upon or following death.
23 If the gift is made to a specified donee who is not available
24 at the time and place of death, the attending physician upon
25 or following death, in the absence of any expressed indication
26 that the donor desired otherwise, may accept the gift as donee.

1 "(d) The donor may designate in his will, card, or other
2 document of gift the surgeon or physician to carry out the
3 appropriate procedures, subject to the provisions of G. S.
4 90-220.7(b). In the absence of a designation or if the
5 designee is not available, the donee or other person autho-
6 rized to accept the gift may employ or authorize any surgeon
7 or physician for the purpose.
8
9 "(e) Any gift by a person designated in G. S. 90-220.2(b)
10 shall be made by a document signed by him or made by his tele-
11 graphic, recorded telephonic, or other recorded message.

Comment

Most existing state statutes authorizing anatomical gifts provide for doing so either by will or by other document in writing. The number of witnesses varies from state to state, but the majority require two witnesses. The Uniform Act requires two witnesses to validate a gift during the donor's lifetime, but witnesses are relatively unnecessary in the case of a gift by next of kin since they are available in person. Hence, none are required in such cases. To facilitate availability of evidence of the gift, a card may be carried on the person, a practice commonly and successfully followed in connection with gifts of eyes. This is an important provision, for we are a peripatetic people and the advantages of a card carried on the person stating the donor's intention to donate is apparent. Also important are the provisions of Subsection (c) that permit the attending physician upon or following death to be the donee when no donee is named or when the named donee is not available. The donee physician cannot participate personally in removing or transplanting a part, but he can, of course, make a further gift to another person for any authorized purpose.

Attention should also be called to Subsection (e) authorizing the next of kin to make gifts by "telegraphic, recorded telephonic, or other recorded message." Frequently the next of kin are far away, and this provision, not found in any existing statute, has the advantage of expediting the procedures where time for effective action is short.

12 "§90-220.5. Delivery of document of gift. If the gift is
13 made by the donor to a specified donee, the will, card, or other
14 document, or an executed copy thereof, may be delivered to the
15 donee at any time to expedite the appropriate procedures immedi-
16 ately after death. Delivery is not necessary to the validity
17 of the gift. The will, card, or other document, or an executed
18 copy thereof, may be deposited in any hospital, bank or storage
19 facility, or registry office that accepts it for safekeeping or
20 for facilitation of procedures after death. On request of any
21 interested party upon or after the donor's death, the person in
22 possession shall produce the document for examination.

Comment

Some of the statutes make rather formal mandatory provisions for filing of documents of gift. Thus in two states the gift must be "filed for record in the office of the judge of probate." In another the document must be filed either before death or within 60 hours after death with the State Department of Health. In another the instrument must be filed for record "in the office of the clerk of the district court of the parish wherein the person making the gift resides." In still another the instrument must be filed in the probate court. In two states it is provided that the instrument shall be delivered by the donor to the donee. On the other hand, in the great majority of the states, no provision is made for filing, recording or delivery to the donee. The gift is by implication effective without such formality. Section 5 of the Uniform Act follows the majority permissive practice, but includes permissive filing provisions to expedite post-mortem procedures.

23 "§90-20.6. Amendment or revocation of the gift.—(a) If
24 the will, card, or other document or executed copy thereof, has
25 been delivered to a specified donee, the donor may amend or re-
26 voke the gift by:
27 (1) The execution and delivery to the donee of a signed
28 statement, or

1 (2) An oral statement made in the presence of two per-
2 sons and communicated to the donee, or
3 (3) A statement during a terminal illness or injury
4 addressed to an attending physician and communicated to the
5 donee, or
6 (4) A signed card or document found on his person or in
7 his effects. and made known to the donee.
8 "(b) Any document of gift which has not been delivered to
9 the donee may be revoked by the donor in the manner set out in
10 subsection (a) or by destruction, cancellation, or mutilation
11 of the document and all executed copies thereof.
12 "(c) Any gift made by a will may also be amended or re-
13 voked in the manner provided for amendment or revocation of
14 wills or as provided in subsection (a).

Comment

In about one half of the states no provision is made for revocation. However, in the interest of carrying out the ultimate desires of the donor, there is good reason for

facilitating revocation. Accordingly, about half of the states make affirmative provisions concerning the matter. Usually it is provided that revocation may be accomplished by executing a "like instrument" filed in the manner provided for the instrument of gift and delivered to the donee. In a few states revocation is accomplished by demanding return of the document of gift. There is merit in making revocation both simple and easy to accomplish. Prospective donors are more likely to look with favor on making anatomical gifts if they realize that revocation is readily possible. The Uniform Act makes careful and complete provision for revocation under various contingencies. However, if a donor has deposited an executed copy of an undelivered document of gift as authorized by Section 5, and if the donor desires to revoke the gift, he must see to it that the executed copy which has been deposited is destroyed.

15 "§90-220.7. Rights and duties at death.—(a) The donee
16 may accept or reject the gift. If the donee accepts a gift of
17 the entire body, he may, subject to the terms of the gift,
18 authorize embalming and the use of the body in funeral services.
19 If the gift is of a part of the body, the donee, upon the death
20 of the donor and prior to embalming, shall cause the part to
21 be removed without unnecessary mutilation. After removal of
22 the part, custody of the remainder of the body vests in the sur-
23 viving spouse, next of kin, or other persons under obligation to
24 dispose of the body.

25 "(b) The time of death shall be determined by a physician
26 who attends the donor at his death, or, if none, the physician
27 who certifies the death. Such physician shall not participate
28 in the procedures for removing or transplanting a part.

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1 "(c) A person who acts in good faith in accord with the
2 terms of this Article or the anatomical gift laws of another
3 state is not liable for damages in any civil action or subject
4 to prosecution in any criminal proceeding for his act.

5 "(d) The provisions of this Article are subject to the
6 laws of this State prescribing powers and duties with respect
7 to autopsies.

Comment

Section 7 contains several important provisions. The donee may of course, reject the gift if he deems it best to do so. If he accepts the gift, all possible provision is made for taking account of the interests of the survivors in dignified memorial ceremonies. Also if the donee accepts the gift, absolute ownership vests in him. He may, if he so desires, transfer his ownership to another person, whether the gift be of the whole body or merely a part. He may cause the part to be removed" either by himself or by another person. The only restrictions are that the part must be removed without mutilation and the remainder of the body vests in the next of kin.

Subsection (b) leaves the determination of the time of death to the attending or certifying physician. No attempt is made to define the uncertain point in time when life terminates. This point is not subject to clear cut definition and medical authorities are currently working toward a consensus on the matter. Modern methods of cardiac pacing, artificail respiration, artificial blood circulation and cardiac stimulation can continue certain bodily systems and metabolism far beyond spontaneous limits. The real question is when have irreversible changes taken place that preclude return to normal brain activity and self sustaining bodily functions. No reasonable statutory definition is possible. The answer depends upon many variables, differing from case

to case. Reliance must be placed upon the judgment of the physician in attendance. The Uniform Act so provides.

However, because time is short following death for a transplant to be successful, the transplant team needs to remove the critical organ as soon as possible. Hence there is a possible conflict of interest between the attending physician and the transplant team, and accordingly subsection (b) excludes the attending physician from any part in the transplant procedures. Such a provision isolates the conflict of interest and is eminently desirable. However, the language of the provision does not prevent the donor's attending physician from communicating with the transplant team or other relevant donees. This communication is essential to permit the transfer of important knowledge concerning the donor, for example, the nature of the disease processes affecting the donor or the results of studies carried out for tissue matching and other immunological data.

Subsection (d) is necessary to preclude the frustration of the important medical examiners duties in cases of death by suspected crime or violence. However, since such cases often can provide transplants of value to living persons, it may prove desirable in many if not most states to reexamine and amend, the medical examiner statutes to authorize and direct medical examiners to expedite their autopsy procedures in cases in which the public interest will not suffer.

The entire section 7 merits genuinely liberal interpretation to effectuate the purpose and intent of the Uniform Act, that is, to encourage and facilitate the important and ever increasing need for human tissue and organs for medical research, education and therapy, including transplantation.

An excellent article discussing the Uniform Anatomical Gift Act and the related policy questions is available in the Georgetown Law Journal, Volume 57, No. 1, October, 1968. The article, "Transplantation and Law: The Need for Organized Sensitivity", by Alfred M. Sadler, Jr. and Blair L. Sadler, analyzes the Anatomical Gift Act and discusses its history. The Sadler brothers served as consultants to the National Conference of Commissioners on Uniform State Laws and served on the Maryland Attorney General's Study Commission which participated in the revision of the Maryland Anatomical Gift Act.

8 "§90-220.8. Uniformity of interpretation. This Article
9 shall be so construed as to effectuate its general purpose to
10 make uniform the law of those states which enact it.
11 "§90-220.9. Short title. This Article may be cited as
12 the Uniform Anatomical Gift Act."
13 Sec. 2. Article 14A of Chapter 90 of the General Stat-
14 utes is hereby repealed.

15 Sec. 3. All laws and clauses of laws in conflict with
16 this Act are hereby repealed.
17 Sec. 4. This Act shall become effective October 1, 1969.
18

SUMMARY:

This Act changes the statutory law of North Carolina in these ways:

(1) Wills would no longer be the sole method of making a gift of a part of a human body.

(2) Donors need be only 18 years of age and anatomical gifts may be made by relatives of the decedent in certain cases.

(3) Protections for donors and donees are built into the Act. The donor's attending physician is charged with the responsibility of determining the time of death but he may not participate in removal of or transplantation of a part. This provision protects all involved from the possibility of a conflict of interests. Good faith acts by the donee are protected from criminal and civil liability.

(4) The state of the law will be clarified as permitting anatomical gifts and will be brought up to a standard which ultimately will be uniform throughout the states.

Therefore, after careful study and extensive discussion and deliberation, the General Statutes Commission adopted the Uniform Anatomical Gift Act with the few changes noted and now urges its enactment.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO REWRITE G. S. 28-174, RELATING TO DAMAGES RECOVERABLE FOR DEATH BY WRONGFUL ACT (GSC 245)

The purposes of this Act are to considerably broaden the scope of G. S. 28-174 and to substantially modify the "pecuniary value" rule for computing damages in North Carolina wrongful death cases.

The common law, adopted as the law of our State, G. S. 4-1, gave no right of action for the nortious killing of a human being. Gay v. Thompson, 266 N. C. 394, 146 S. E. 2nd 425, 15 A. L. R. 3rd 983; Armentrout v. Hughes, 247 N. C. 631, 101 S. E. 2nd 793, 69 A. L. R. 2nd 620; Hinnant v. Tidewater Power Company, 189 N. C. 120, 126 S. E. 307, 37 A. L. R. 889. Lord Campbell's Act, 9 and 10 Victoria, Chapter 93 (1846), which gave the right to recover damages for death caused by wrongful act in England was the model for our G. S. 28-173 and 28-174.

> § 28-173. **Death by wrongful act; recovery not assets; dying declarations.**—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars ($500.00) incident to the injury resulting in death; provided that all claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act.
>
> In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like manner and under the same rules as dying declarations of the deceased in criminal actions for homicide are now received in evidence.

> § 28-174. **Damages recoverable for death by wrongful act.** — The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death.

In North Carolina today a right of action to recover damages for wrongful death is purely statutory and exists only by virtue of G. S. 28-173 and 28-174. Gay v. Thompson, supra; Lamm v. Lorbacher, 262 N. C. 647, 138 S. E. 2d 487 (1964).

The interpretation placed upon this statute by the North Carolina court is illustrated by the following extracts from selected cases:

The following is taken from the case of Lamm v. Lorbacher, 235 N. C. 728, 71 SE 2d 49 (1952), stating the pecuniary value rule and denying recovery for the value of the services of a mother as a housewife:

DEVIN, C. J. The plaintiff appeals from the judgment below on the ground that the amount of damages awarded for the wrongful death of his intestate was inadequate. He assigns as error the court's charge to the jury in stating the rule for the measure of damages in this case.

In 1846 the common law rule that right of action for personal injury did not survive the death of the injured person was abrogated in England by statute (9 and 10 Vict. C..93), known as Lord Campbell's Act, which permitted recovery in an action by the administrator when the death of the decedent was due to the unlawful or negligent act of another. In North Carolina this change in the common law rule was adopted by statute in 1869, now codified as G.S. 28-173, and G.S. 28-174, and right of action for wrongful death was conferred upon the personal representative of the decedent, with the further provision that "The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death." So that the action for wrongful death exists only by virtue of this statute and the statutory provision must govern not only the right of action but also the rule for determining the basis and extent of recovery of damages therefor.

In interpreting the language of the statute the rule has been well stated by *Chief Justice Stacy* in a recent opinion in *Journigan v. Ice Co.*, 233 N.C. 180 (184), 63 S.E. 2d 183, as follows:

"The measure of damages in actions for wrongful death is the present worth of the net pecuniary value of the life of the deceased to be ascertained by deducting the probable cost of his own living and usual or ordinary expenses from his probable gross income which might be expected to be derived from his own exertions during his life expectancy. *Carpenter v. Power Co.*, 191 N.C. 130, 131 S.E. 400; *Gurley v. Power Co.*, 172 N.C. 690, 90 S.E. 943. In arriving at the net pecuniary value of the life of the deceased, the jury is at liberty to take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had for earning money, the end of it all being, as expressed in *Kesler v. Smith*, 66 N.C. 154, to enable the jury fairly to arrive at the net income which the deceased might reasonably be expected to earn from his own exertions, had his death not ensued, and thus assess the pecuniary worth of the deceased to his family, had his life not been cut short by the wrongful act of the defendant. *Burns v. R. R.*, 125 N.C. 304, 34 S.E. 495; *Burton v. R. R.*, 82 N.C. 505." See also *Hanks v. R. R.*, 230 N.C. 179, 52 S.E. 2d 717; *Rea v. Simowitz*, 226 N.C. 379, 38 S.E. 2d 194; *Coach Co. v. Lee*, 218 N.C. 320 (328), 11 S.E. 2d 341.

In the excerpt from the charge to which plaintiff noted exception the trial judge seems to have instructed the jury in substantial accord with the decisions of this Court, and particularly to have followed the language in *Coach Co. v. Lee, supra*, and *Carpenter v. Power Co., supra*. The use of the word "family" in the connection in which it was used may be understood as meaning estate. *Hanks v. R. R., supra*. It affords the plaintiff no ground of complaint.

The plaintiff, however, urges upon us that in view of the evidence that the plaintiff's intestate, aged 33 years, was an educated woman, a housewife and mother of two children, and had several years before been employed at $165 per month, the court's instruction to the jury on the issue of damages should have included "a statement as to the value of her labor" as a housewife, and relies upon what was said in *Bradley v. R. R.*, 122 N.C. 972, 30 S.E. 8. In that case in an action for wrongful death of a wife and mother a new trial was awarded for the trial court's error in charging the jury they might consider the number of decedent's children in so far as that helped them to put a pecuniary value on the intellectual and moral training that she might be able to give them. This was held for error, but in the opinion of *Chief Justice Faircloth* it was said in interpreting the phrase pecuniary injury, "It will be noted that under

> our statute the pecuniary injury is the measure. That means the value of the labor or the amount of the earnings of the deceased if he had lived." In a concurring opinion in that case *Justice Douglas* observed moral training of children was beyond the reach of human calculations and that "We have no scales by which to measure the value of a mother and the moral influence she may have upon her children." We do not understand that the Court in the *Bradley case* intended to extend the rule for the admeasurement of damages in such case to include as an element of damage labors of the decedent which were gratuitous and for which she received no compensation. The view that the value of decedent's labor in the home as a housewife should be considered by the jury in determining the amount of damages recoverable is supported by reputable authority in some other jurisdictions (74 A.L.R. 95, note), but under the North Carolina statute as interpreted by the decisions of this Court compensation for wrongful death is limited to "the pecuniary injury resulting from such death." This phrase has remained unchanged since the statute was enacted in 1869. Hence this Court has uniformly held, in view of this restrictive language, that the consideration of the jury should be confined to determining the amount of money the decedent would have earned during the period the jury find he would otherwise have lived, and, then, after deducting the probable cost of his ordinary living expenses, to ascertaining the present worth of the accumulation of such net earnings as the pecuniary value of the life of the decedent to his estate. This rule, though sometimes difficult of application, applies to all alike. *Rea v. Simowitz*, 226 N.C. 379, 38 S.E. 2d 194. The right of action is for the personal representative of the deceased only. "The right of action for wrongful death, being conferred by statute at death, never belonged to the deceased, and the recovery is not assets in the usual acceptation of the term." *Broadnax v. Broadnax*, 160 N.C. 432, 76 S.E. 216; *Hood v. Tel. Co.*, 162 N.C. 92, 77 S.E. 1094; 28 N.C. Law Review 106.

In the case of Bryant v. Woodlief, 252 N. C. 488, 114 SE 2d 241 (1960), the court permitted other income to be received for life to be used, in addition to expected income from earnings, in calculating pecuniary value:

> The defendants insist and seriously contend that the pecuniary value of the life of plaintiff's testate is limited to the net income which the deceased might reasonably have been expected to earn from his own labors had his life not been cut short by his untimely death. *Caudle v. R. R.*, 242 N.C. 466, 88 S.E. 2d 138; *Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E. 2d 49; *Journigan v. Ice Co.*, 233 N.C. 180, 63 S.E. 2d 183; *Queen City Coach Co. v. Lee*, 218 N.C. 320, 11 S.E. 2d 341; *Carpenter v. Power Co.*, 191 N.C. 130, 131 S.E. 400; *Purnell v. R. R.*, 190 N.C. 573, 130 S.E. 313; *Poe v. R. R.*, 141 N.C. 525, 54 S.E. 406; *Russell v. Steamboat Co.*, 126 N.C. 961, 36 S.E. 191.
>
> Ordinarily, in an action for wrongful death the plaintiff's evidence presents no facts that would warrant any formula or method for ascertaining the fair and reasonable compensation for the pecuniary injury resulting from wrongful death, other than that laid down in the above cases. Even so, we do not understand that the general rule in this respect would exclude the inclusion of income from an annuity, life estate, retirement pay or other income for life only, in arriving at the pecuniary loss sustained by reason of wrongful death.
>
> In *Poe v. R. R., supra*, it is said: "This Court has not prescribed any 'hard and fast rule' by which to bind the jury in making the estimate of what sum should be given or to require them to give the assessment of the damages in any particular way."
>
> In the case of *Mendenhall v. R. R.*, 123 N.C. 275, 31 S.E. 480, a proper charge in such case was given and its form was commended as a safe one for guidance in the opinion of *Poe v. R. R., supra*, and is as follows: "The measure of damages is the present value of the net pecuniary worth of the deceased to be ascertained by deducting

the cost of his own living and expenditures from the gross income, based upon his life expectancy. As a basis on which to enable the jury to make their estimate, it is competent to show, and for them to consider the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was employed — the end of it all being to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued, and thus arrive at the *pecuniary worth of the deceased to his family.* You do not undertake to give the equivalent of human life. You allow nothing for suffering. You do not attempt to punish the railroad, but you seek to give a fair, *reasonable pecuniary worth of the deceased to his family,* under the rule which I have laid down. You should rid yourself of all prejudice, if you have any, and of sympathy. It is not a question of sympathy; it is just a plain, practical question, and you should give a reasonable and fair verdict upon all the issues." (Emphasis added)

In *Collier v. Arrington,* 61 N.C. 356, it is said: " * * * our statute, which gives an action to the representative of a deceased party, who was injured or slain by a trespasser, confines the recovery to the amount of *pecuniary injury.* It does not contemplate *solatium* for the plaintiff, nor punishment for the defendant. It is therefore in the nature of pecuniary demand; the only question being, *how much has the plaintiff lost by the death of the person injured?*" (Emphasis added)

In *Kesler v. Smith,* 66 N.C. 154, the opinion states: "The defendant in open court admitted the unlawful killing, and the sole point at issue and tried was the question of damages." In discussing this point, *Reade, J.,* speaking for the Court, said: "The English statute (9-10 Vic., ch. 93) is substantially the same as ours. It is not precisely as definite as ours as to the rule of damages, inasmuch as our statute specifies *'pecuniary injury,'* whereas the English statute also makes it the duty of the jury to apportion the damages among the beneficiaries, which ours does not.

"Although the English statute omits *pecuniary,* yet the rule of damages which the courts have laid down is 'the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased.' We have carefully examined the English cases, and although the rule is not laid down in all of them in precisely these words, yet in substance it is; and *the rule* may now be said to be *settled as* above."

It will be noted that the pecuniary worth of a life in a wrongful death case was not limited in our earlier cases to the net income the deceased would probably have earned during his life expectancy had his life not been terminated by wrongful death.

In Scriven v. McDonald, 264 N. C. 727, 142 SE 2d 585 (1965), the court stated the rule that there could be no recovery of punitive or nominal damages, and held that nonsuit should have been granted when the decedent was incompetent with no earning capacity:

Under our statute conferring a right of action for wrongful death, G.S. 28-173, "(t)he plaintiff in such action may recover such damages as are a fair and just compensation for the *pecuniary* injury resulting from such death." (Our italics.) G.S. 28-174. "It does not provide for the assessment of punitive damages, nor the allowance of nominal damages in the absence of *pecuniary* loss." (Our italics.) *Armentrout v. Hughes,* 247 N.C. 631, 101 S.E. 2d 793, 69 A.L.R. 2d 620; *Hines v. Frink,* 257 N.C. 723, 127 S.E. 2d 509.

Plaintiff's evidence and portions of Dr. Mangum's testimony not in conflict therewith confront us with the fact that Anthony, from birth until death, was mentally retarded and thereby seriously handicapped.

> Absent substantial evidence, medical or otherwise, tending to show a reasonable probability Anthony could or might overcome his handicap, the only reasonable conclusion to be drawn from the evidence is that he would continue to be a dependent person rather than a person capable of earning a livelihood. The burden of proof is upon plaintiff to show pecuniary loss to the estate on account of Anthony's death. In our view, plaintiff's evidence negatives rather than shows such pecuniary loss. Hence, the court erred in denying defendants' motion for judgment of involuntary nonsuit.

In Sharpe v. Pugh, 270 N. C. 598, 155 SE 2d 108 (1967), the court stated the rule with regard to separate causes of action for pain and suffering before death and for damages for death by wrongful act:

> If, as alleged, Brenda was injured and later died as a result of defendant's actionable negligence, her administrator has two causes of action against defendant, namely, (1) a cause of action to recover, as assets of Brenda's estate, damages on account of her pain and suffering; and (2) a cause of action to recover, for the benefit of her next of kin, damages on account of the pecuniary loss resulting from her death. *Hoke v. Greyhound Corp.*, 226 N.C. 332, 38 S.E. 2d 105; *Hinson v. Dawson*, 241 N.C. 714, 86 S.E. 2d 585; 50 A.L.R. 2d 333; *In re Peacock*, 261 N.C. 749, 136 S.E. 2d 91. While the basis for each is the same wrongful act, the causes of action are separate and distinct. The parties are the same. However, each action must be determined on separate issues. *Hinson v. Dawson, supra; In re Peacock, supra.* "When separate causes of action are united in the same complaint they must be separately stated." 3 Strong, N. C. Index, Pleadings § 3. If not separately stated, it would seem that the complaint would be demurrable for misjoinder of causes of action. *Monroe v. Dietenhoffer*, 264 N.C. 538, 541, 142 S.E. 2d 135, 137; 1 McIntosh, N. C. Pract. & Proc. § 1188 (2d ed., 1964 Supp.)

The principal effects of enactment of this statute in its present form would be to abrogate case law on a number of principles in North Carolina:

(1) That recovery be limited to pecuniary value, stated in Lamm v. Lorbacher, supra; Stetson v. Easterling, 274 N. C. 152 (1968); Green v. Nichols, 274 N. C. 18 (1968).

(2) That pain and suffering of a decedent from injuries resulting in death and death by wrongful act are two separate causes of action and must be stated separately, stated in Sharpe v. Pugh, supra; In re Peacock, 261 N. C. 749, 136 S. E. 2d 91 (1964).

(3) That society, companionship, comfort and other solatium are not recoverable in an action for wrongful death, stated in Collier v. Arrington, 61 N. C. 356.

(4) That value of services owed or expected to be gratuitously

rendered are not recoverable in a wrongful death action, stated in Byrd v. Southern Express Co., 139 N. C. 273, 51 S. E. 2d 851 (1905).

(5) That neither punitive damages nor nominal damages are recoverable in a wrongful death action, stated in Martin v. Currie, 230 N. C. 511, 53 S. E. 2d 447; Armentrout v. Hughes, supra; Hines v. Frink, 257 N. C. 723, 127 S. E. 2d 509; Scriven v. McDonald, supra.

Cases in other states may be found which deny and which permit recovery in each instance included here. The statutes vary, and the decisions, in some instances when the wording of the statute is similar, vary even more. In some states there are constitutional requirements in addition to statutory provisions. See generally, 22 Am. Jur. 2d, Death §§ 126--178.

The General Statutes Commission recommends this proposed statute and urges its enactment.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND THE FEDERAL TAX LIEN REGISTRATION ACT TO COMPLY WITH THE FEDERAL TAX LIEN ACT OF 1966. (GSC 238)

The General Statutes Commission has considered in great detail and has secured Internal Revenue Service approval for its draft of this bill. Patterned after the uniform act with very minor modifications to meet the North Carolina experience, the Act was necessitated by passage of the Federal Tax Lien Act of 1966 (P. L. 89-719). Failure of the State to enact either the Revised Uniform Act or some act meeting the requirements of Public Law 89-719 would result in the Federal tax liens being recorded in the office of the Federal District Court in the place where the property is situated. This would work a considerable inconvenience and hardship on title attorneys attempting to ascertain the existence of Federal tax liens on local property. The preface to the Uniform Act commentary is set out in full below.

REVISED UNIFORM FEDERAL TAX LIEN REGISTRATION ACT

PREFATORY NOTE

Section 6323 of the United States Internal Revenue Code of 1954, as amended by P.L. 89-719, Federal Tax Lien Act of 1966 provides that liens for an unpaid federal tax shall not be valid as against mortgagees, pledges, judgment creditors, purchasers and holders of other security interest until notice of the tax lien has been filed in an office designated by the law of the state in which the property subject to the lien is situated, or, in the absence of a valid state designation, in the federal district court for the place where the property is situated. Under federal law, personal property is deemed situated at the residence of the taxpayer regardless of its physical location.

Thus the new federal act would invalidate any provision of a state law which required filing of liens for property other than real estate at more than one office or at any state office other than that associated with the residence of the taxpayer. State law requiring filing at the physical location of personal property or at both physical location and residence of the taxpayer is not permissible and if a state law includes such a provision the Internal Revenue Service would, for that state, file liens in the federal district court rather than in a state office.

The new federal legislation provides for filing of certain types of certificates and notices affecting previously filed liens which some of the existing state legislation does not provide for. The effectiveness of these additional notices as a communication to interested persons depends on their being filed in the same office where the notice of lien is filed. It is necessary, therefore, that state law be broadened to permit filing and indexing of these additional notices.

In addition to the above reasons for new state legislation, there is another reason for revising existing state laws concerned with federal tax liens. Many of the existing laws are no longer appropriate in the states (all but three in December, 1966) which have enacted the Uniform Commercial Code. It is highly desirable that the place for filing

and searching for federal tax liens be the same place as that designated by the state law under the Uniform Commercial Code for filing and searching for a security interest in the same property. Unfortunately, complete coordination of federal tax lien filing with the rules for filing under the Uniform Commercial Code cannot be fully achieved by state legislation. The United States Supreme Court has held that the Congressional permission to a state to designate the office for filing of federal tax liens cannot be taken advantage of by the states in such a way as to require the federal tax collector to specify the particular property to which the lien applies. *United States v. Union Central Life Insurance Company*, 363 U.S. 291 (1961). The Internal Revenue Service has interpreted this decision to preclude a state requirement for filing federal tax liens in conformity with the Uniform Commercial Code because of the Code's differing requirements for various types of property and its requirement for filing in two offices in some cases. Rev. Rul. 64-170, 1964-1 Cum. Bull. 499. P.L. 89-719 continues this interpretation.

Nevertheless, it is possible to go a long way toward bringing federal tax lien filing into conformity with the Uniform Commercial Code and it is highly desirable to do so in order to accommodate to commercial convenience so far as possible within the limitations of federal law. States which departed from the uniformity of the Commercial Code by amendment as to the place of filing may now wish to conform their Commercial Code to the original uniform version at the same time they change the federal tax lien requirements. The Act presented here calls for filing on taxpayers who are corporations or partnerships in the office of the Secretary of State and in all other cases in an office in the place where the taxpayer resides. No provision is possible calling for filing of the tax lien at the place where particular kinds of property are physically located. Any attempt to deviate from the proposed place of filing in this Code risks non-compliance with Federal Law. The federal act does permit filing of notices as to real property in an office at the place where the real property is situated. It has no such permission for other kinds of property. Section 1 of the Act contained herein complies with the federal requirement.

The present act was prepared in light of Public Law 89-719 of 1966 amending Section 6323 of the Internal Revenue Code of 1954. The Internal Revenue Service has reviewed the Act and believes it meets the requirement of federal law. The Conference recommends that it be adopted and that existing legislation concerning federal tax liens be repealed.

SECTION 44-68.1(a) provides for instruments affecting real property to be filed in the Clerk of Superior Court's Office. Subsection (b) deals with liens on personal property. For individuals the instruments affecting personal property are filed in the Clerk of Superior Court's Office of the taxpayer's residence. For corporations and partnerships, the instruments are filed in the Secretary of State's Office.

SECTION 44-68.1 Uniform Act Comment:

COMMENT

In order to accommodate to commercial convenience so far as possible within the limitations of Section 6323 of the Internal Revenue Code, filing with the Secretary of State is provided for the lien on tangible and intangible personal property of partnerships and corporations (as those terms are defined in section 7701 of the Internal Revenue Code of 1954 and the implementing regulations) thus including within "partnerships" such entities as joint ventures and within "corporations" such entities as joint stock corporations and business trusts.

Since most purchases and secured transactions involving personal property of natural persons would relate to consumer goods or farm personal property, searches for liens against such persons are more likely to be made at the local level. Thus, with few exceptions a search for corporation federal tax liens with the Secretary of State and for natural persons with an officer in the county of residence will normally be in the same office as searches for security interests under the Uniform Commercial Code.

Section 6323 of the Internal Revenue Code "locates" all tangible and intangible personal property at the residence of the taxpayer even though it is physically located elsewhere in the same or in another state. State law cannot vary this requirement. State law does affect the result, however, in that state law determines the "residence" of a taxpayer. See IRC § 6323 (f)(2). Filing at the physical location of personal property of a taxpayer who is not a resident of the state of location of the property cannot be required.

SECTION 44-68.2 eliminates any requirement for formal acknowledgment of the instrument of notice sought to be filed.

SECTION 44-68.3 (a) provides that the Secretary of State files tax liens according to GS 25-9-403 (4) as for a financing statement. The Clerk of Superior Court is required to file, mark the time of filing, index alphabetically and docket the tax lien notice with certain pertinent information. No rules inconsistent with this act can be promulgated.

Subsection (b) provides for the Secretary of State to treat the filing of a release or non attachment in the same manner as UCC termination statement and to treat a certificate of discharge or subordination to be treated as a UCC release of collateral.

Subsection (c) sets out the Clerk's duties with respect to the instruments discussed in (a) and (b).

Subsection (d) requires the filing officer on request to certify whether there is on record in his office a federal tax lien and to give the time and date of receipt of each notice. A copy of the notice may be requested.

SECTION 44-68.3 Uniform Act Comment:

COMMENT

It is the practice of the Internal Revenue Service to regard a "certificate of discharge" as primarily referable to specific pieces of property so that a certificate of discharge corresponds to a release under section 9-406 of the Uniform Commercial Code. A "certificate of release" in tax practice is equivalent to a "termination statement" in section 9-404 of the Commercial Code in the sense that it is a general statement applicable to all property or types of property referred to in the termination statement.

SECTION 44-68.4(a) sets out fees payable to the Secretary of State for filing and indexing tax liens, notices and other instruments.

Subsection (b) sets out the fee payable to the Secretary of State for furnishing certificates as to existence of liens and copies of notices.

Subsection (c) provides that fees payable to the Clerk of Court are governed by G. S. 7A-308 (G. S. 7A-308(a) (9) and (a) (10).

Subsection (d) provides for monthly fee billing of IRS District Directors.

SECTION 44-68.4 Uniform Act Comment:

COMMENT

It is understood that the Treasury accepts the obligation to pay non-discriminatory filing fees for filing notice of tax liens but desires such payments to be on a monthly billing basis. For notice of tax lien on real property, the filing fee for a real estate mortgage may serve as a standard; for a filing fee on notice of tax lien on personal property the filing fee for filing a financing statement may serve as a standard. There is now no established practice concerning fees for other notices. The certificate of discharge is comparable to a satisfaction of a real estate mortgage and to a release of collateral under section 9-406 of the Uniform Commercial Code. Such notices are usually filed by persons other than the Treasury, and a filing fee for such filing should be prescribed.

A different problem is presented by certificates of release or non-attachment. Sometimes these certificates serve the purpose of permitting the public filing official to clear his records, and for this purpose the filing fee should perhaps be low in order to induce filing for this purpose. Sometimes these notices are filed for purposes of the taxpayer. Given the volume of notices of tax liens which are filed daily in large filing offices, it may serve the public interest to have filed certificates of release. From the standpoint of the Treasury, these certificates serve no important purpose, and they may not file them if the fee is large. In adoption of this law, consideration should be given by the states to providing a substantially smaller fee for filing a certificate of release, so that when a tax case is closed the Treasury will file such releases in a routine manner in order to reduce the storage and administrative problem of the local and state filing officers.

SECTION 44-68.5 Uniform Act Prefactory Note:

NOTE

If, on adoption of this Act, notice of tax liens continue to be filed in the same offices they were filed in before the passage of this Act, no particular problem concerning discharges and releases of tax liens filed before the passage of the Act is presented. If, however, the effect of this Act is to change the office in which federal tax liens and notices concerning such liens will thereafter be filed, a problem arises concerning releases, certificates, and other notices affecting a notice of tax lien filed before the passage of the Act. If change of place of filing results from this Act, a state may wish to consider the following additional Section:

SECTION 44-68.5 provides that notices filed prior to the effective date of the Act are to be maintained in a separate file.

The Federal Internal Revenue Service has, through the office of its General Counsel, approved the language of our proposed Act. Correspondence exchanged between the Chairman of the General Statutes Commission and the Internal Revenue Service will be submitted for your review.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO REWRITE AND CLARIFY THE STATUTORY LIMITATION UPON RIGHT TO AUTOPSY (GSC 260).

The current statute governing limitations on right to perform autopsy is G. S. 90-217 which reads as follows:

> § **90-217. Limitation upon right to perform autopsy.**—The right to perform an autopsy upon the dead body of a human being shall be limited to cases specially provided by statute or by direction or will of the deceased, and cases where the husband or wife or one of the next of kin or nearest known relative or other person charged by law with the duty of burial, in the order named and as known, shall authorize such examination or autopsy. (1931, c. 152; 1933,

The proposed statute (SB 61) clarifies the law and improves on the present statute in several ways:

(1) It incorporates into its own terms the specific statutory references which previously were required to be mentioned in editorial footnotes.

(2) It clarifies what constitutes consent to an autopsy by "direction" of the deceased and clearly states that a decedent may request that an autopsy be performed on his own body by oral request to his physician during a terminal illness or by a written request less formal than a will.

(3) The proposed statute sets out the persons eligible to give consent to an autopsy, the order of priority of those persons eligible to give consent, and establishes that one of a class of relatives may consent to an autopsy in the absence of announced opposition by a member of a prior class or the same class or actual notice of contrary indications of the decedent.

(4) The proposed statute substitutes the standard of "available at the time of death" for the vague language of the present act's "as known" which had previously given rise to many practical problems concerning relatives out of the country, minor and otherwise incompetent relatives.

(5) The order of priority for consent set out in the proposed statute rules out the questions inherent in dealing with equally entitled relatives within the same degree of kinship under the "next of kin" language.

The proposed Act clarifies the law by making available a concise and workable definition of rights and priorities. Persons and agencies called upon to act in this delicate area can, under the proposed statute, make decisions based upon clearly-defined rights and obligations as opposed to the presently uncertain state of the law.

The General Statutes Commission has considered this proposed statute at length and on several occasions. The Commission recommends this bill and urges its enactment.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO CORRECT SEVERAL SEPARATE STATE BOARD, COMMISSION AND COMMITTEE AUTHORIZATION ACTS TO CONFORM TO G. S. 138-5 WITH REGARD TO THE AMOUNT OF PER DIEM PAYMENTS AUTHORIZED FOR MEMBERS. (GSC 258)

FROM: Sidney S. Eagles, Jr., Revisor of Statutes

There are approximately 100 separate acts establishing State boards, agencies and commissions which provide in their own terms for per diem and expense allowances to be paid to the members of these respective boards. The acts sought to be amended by this bill were enacted prior to 1963.

In 1961 the General Assembly sought to equalize and to limit the amount of per diem payable to members of State agencies, commissions and boards by enacting G. S. 138-5 (1961, c. 833, s. 5; 1963, c. 1049, s. 1). It established the maximum per diem for members of State boards, agencies and commissions "who operate from funds deposited with the State Treasurer" at $7.00 a day. A general repealer clause had the effect of repealing the compensation clauses of then existing commissions and boards authorization acts. Subsequently enacted special per diem provisions are not affected. Due either to inadvertence or haste, the separate acts were never purged of the repealed language purporting to authorize a higher payment for per diem. This bill is simply an effort to purge these acts of repealed material and to amend the pre-1961 special statutes so that they refer to G. S. 138-5 as authority for per diem payments. No increase and no decrease of compensation authorized to be paid will result.

The Michie Company has been requested to incorporate in the annotation of each of these statutes an explanatory cross reference to G. S. 138-5.

1 A BILL TO BE ENTITLED AN ACT TO CORRECT SEVERAL SEPARATE STATE
2 BOARD, COMMISSION AND COMMITTEE AUTHORIZATION ACTS TO CONFORM
3 TO G. S. 138-5 WITH REGARD TO THE AMOUNT OF PER DIEM PAYMENTS
4 AUTHORIZED FOR MEMBERS.
5 The General Assembly of North Carolina do enact:
6 Section 1. G. S. 159-4 is hereby amended by deleting
7 from the fourteenth line thereof the following words "ten dol-
8 lars" and inserting in lieu thereof the words "the amount pro-
9 vided in G. S. 138-5."
10 Sec. 2. G. S. 119-26 is hereby amended by deleting from
11 the eighth line thereof the words, "sum of ten dollars" and in-
12 serting in lieu thereof the words "amount provided by G. S. 138-
13 5."
14 Sec. 3. G. S. 164-19 is hereby amended by deleting from
15 the first and second lines thereof the following words, "ten
16 dollars a day", and inserting in lieu thereof the words, "the
17 amount of per diem provided by G. S. 138-5."
18 Sec. 4. G. S. 130-4 is hereby amended by deleting from the
19 second line of the second paragraph thereof the following words,
20 "ten dollars ($10.00) per diem, unless the Biennial Appropria-
21 tions Act specifically provides otherwise," and inserting in lieu
22 thereof the words, "the amount of per diem provided by G. S. 138-
23 5."
24 Sec. 5. G. S. 143-245 is hereby amended by deleting from

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1 the second line thereof the words, "not more than ten dollars
2 ($10.00) per diem" and inserting in lieu thereof the words, "the
3 amount of per diem provided by G. S. 138-5."
4 Sec. 6. G. S. 90-248 is hereby amended by deleting from
5 the second and third lines thereof the words, "sum of ten ($10.00)
6 dollars per day" and inserting in lieu thereof the words "amount
7 of per diem provided by G. S. 138-5."
8 Sec. 7. G. S. 90-257 is hereby amended by deleting from
9 the seventh and eighth lines of the second paragraph thereof
10 the following words, "$10.00 per diem" and inserting in lieu
11 thereof the words "the amount of per diem provided by G. S. 138-
12 5."

13 Sec. 8. G. S. 87-17 is hereby amended by deleting from the
14 fourth and fifth lines thereof the words, "ten dollars per day"
15 and inserting in the fifth line thereof after the word, "com-
16 mittees" the words, "the amount of per diem provided by G. S.
17 138-5."

18 Sec. 9. G. S. 87-53 is hereby amended by deleting from the
19 fourth and fifth lines thereof the words, "fifteen dollars ($15.00)
20 per day "and inserting in lieu thereof the words, "the amount of
21 per diem provided by G. S. 138-5."

22 Sec. 10. All laws and clauses of laws in conflict with
23 this Act are hereby repealed.

24 Sec. 11. This Act shall become effective upon ratification.

The sections changed and the agencies affected are:

1. G. S. 87-17, State Board of Examiners of Plumbing and Heating Contractors;
2. G. S. 87-53, State Board of Refrigeration Examiners;
3. G. S. 90-248, North Carolina Board of Opticians;
4. G. S. 90-257, State Examining Committee of Physical Therapists;
5. G. S. 1A-26, Gas and Oil Inspection Board;
6. G. S. 130-4, State Board of Health;
7. G. S. 143-245, North Carolina Wildlife Resources Commission;
8. G. S. 159-4, Local Government Commission;
9. G. S. 164-19, General Statutes Commission.

The General Statutes Commission has considered this bill and recommends it for enactment at this time.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO CORRECT CERTAIN ERRORS IN THE GENERAL STATUTES (GSC 222).

FROM: Sidney S. Eagles, Jr.
Resivor of Statutes

This bill corrects a number of errors in wording which have occurred in the General Statutes. There are instances of typographical errors in bills which were subsequently enacted into law. There are several instances of incorrect citations to statutory sections as well as citations to non-existent statutory sections. In this bill, the Commission proposes to correct twelve such instances discovered since the 1967 General Assembly.

1 A BILL TO BE ENTITLED
2 AN ACT TO CORRECT CERTAIN ERRORS IN THE GENERAL STATUTES.
3 The General Assembly of North Carclina do enact:
4 Section 1. G. S. 141-6(a), as the same appears in 1964
5 Replacement Volume 3C of the General Statutes, is hereby amended
6 by striking out of the second line thereof the figures "31" and
7 inserting in lieu thereof the figures "34".

Comment:

G. S. 141-6(a) now appears as follows:

§ 141-6. Eastern boundary of State; jurisdiction over territory within littoral waters and lands under same.—(a) The Constitution of the State of North Carolina, adopted in 1868, having provided in article I, § 31, that the "limits and boundaries of the State shall be and remain as they now are," and the eastern limit and boundary of the State of North Carolina on the Atlantic seaboard having always been, since the Treaty of Peace with Great Britain in 1783 and the Declaration of Independence of July 4th, 1776, one marine league eastward from the Atlantic seashore, measured from the extreme low water mark, the eastern boundary of the State of North Carolina is hereby declared to be fixed as it has always been at one marine league eastward from the seashore of the Atlantic Ocean bordering the State of North Carolina, measured from the extreme low water mark of the Atlantic Ocean seashore aforesaid.

Editor's Note.—The reference to the Constitution in the first sentence of this section evidently should read "article I, § 34" instead of "article I, § 31."

Art. I, §§ 31 and 34 of the Constitution are as follows:

§ 31. Perpetuities, etc.—Perpetuities and monopolies are contrary to the genius of a free state and ought not to be allowed. (Const. 1868.)

§ 34. State boundaries.—The limits and boundaries of the State shall be and remain as they now are. (Const. 1868.)

8 Sec. 2. G.S. 143-132, as the same appears in 1964
9 Replacement Volume 3C of the General Statutes, is hereby amended
10 by striking out of the second line thereof the figures, "Sec.
11 143-120" and inserting in lieu thereof the figures, "Sec. 143-
12 129".

Comment:

G. S. 143-132 now appears as follows:

§ 143-132. **Minimum number of bids for public contracts.**—No contracts to which § 143-120 applies for construction or repairs shall be awarded by any board or governing body of the State, or any subdivision thereof, unless at least three competitive bids have been received from reputable and qualified contractors regularly engaged in their respective line of endeavor, when the estimated cost of the project exceeds the sum of twenty thousand dollars ($20,000.00); however, this section shall not apply to contracts which are negotiated as provided for in § 143-129. Provided that if after advertisement for bids as required by G. S. 143-129, not as many as three competitive bids have been received from reputable and qualified contractors regularly engaged in their respective lines of endeavor, said board or governing body of the State institution or of a county, city, town or other subdivision of the State shall again advertise for bids; and if as a result of such second advertisement not as many as three competitive bids from reputable and qualified contractors are received, such board or governing body may then let the contract to the lowest responsible bidder submitting a bid for such project, even though only one bid is received. (1931, c. 291, s. 3; 1951, c. 1104, s. 3; 1959, c. 392, s. 2; 1963, c. 289.)

G. S. 143-120 is a part of Article 7 of Chapter 143, which requires inmates of State Institutions to pay costs, and §143-120 is catchlined "Determining who is able to pay."

G. S. 143-129 is a part of Article 8, "Public Building Contracts", and §143-129 is catchlined "Procedure for letting of public contracts; purchases from federal government by State, counties, etc."

13 Sec. 3. G.S. 164-13(a)(2) is hereby amended by striking out
14 of the third line thereof the symbols and figures "Sec. 114-9(b)"
15 and inserting in lieu thereof the symbols and figures "Sec. 114-
16 9(2)".

COMMENT:

G. S. 164-13(a)(2) now appears as follows:

§ 164-13. **Duties; use of funds.**—(a) It shall be the duty of the Commission:
(2) To advise and co-operate with the Division of Legislative Drafting and Codification of Statutes in the preparation and issuance by the Division of supplements to the General Statutes pursuant to § 114-9 (b).

It makes reference to cooperation in the preparation and issuance of supplements to the General Statutes. G. S. 114-9(b) is an incorrect citation to G. S. 114-9(3)(b). G. S. 114-9(2) deals with issuance of supplements.

§ 114-9. **Creation of Division;** powers and duties. — The Attorney General shall set up in the Department of Justice a division to be designated as the Division of Legislative Drafting and Codification of Statutes. There shall be assigned to this Division by the Attorney General duties as follows:

(2) To supervise the recodification of all the statute law of North Carolina and supervise the keeping of such recodifications current by including therein all laws hereafter enacted by supplements thereto issued periodically, all of which recodifications and supplements shall be appropriately annotated.

(3) In order that the laws of North Carolina, as set out in the General Statutes of North Carolina, may be made and kept as simple, as clear, as concise and as complete as possible, and in order that the amount of construction and interpretation of the statutes required of the courts may be reduced to a minimum, it shall also be the duty of the Division of Legislative Drafting and Codification of Statutes to establish and maintain a system of continuous statute research and correction. To that end the Division shall:

b. Consider such suggestions as may be submitted to the Division with respect to the existence of such defects and the proper correction thereof.

17 Sec. 4. G.S. 164-14(5) is hereby amended by striking
18 out the words "Wake Forest College" and inserting in lieu thereof
19 the words "Wake Forest University".

COMMENT:

The section to be amended confers power on the Dean of the Law School of Wake Forest College to appoint a member of the General Statutes Commission.

1 Sec. 5. G.S. 50-16.7(b) is hereby amended by striking
2 out of the last line thereof, immediately after the word
3 "assignment" and before the word "wages", the word "or" and
4 inserting in lieu thereof the word "of".

COMMENT:

In G. S. 50-16.7(b) as it appears in the Session Laws (1967), c. 1152, s. 2)

"§ 50-16.7. How Alimony and Alimony Pendente Lite Paid; Enforcement of Decree.

"(b) The court may require the supporting spouse to secure the payment of alimony or alimony pendente lite so ordered by means of a bond, mortgage, or deed of trust, or any other means ordinarily used to secure an obligation to pay money or transfer property, or by requiring the supporting spouse to execute an assignment or wages, salary, or other income due or to become due.

there seems to have been a typographical error in the bill as ratified even though it appears correctly printed in the General Statutes.

5 Sec. 6. G.S. 105-114 as amended by Session Laws 1967,
6 Chapter 286, effective July 1, 1968, is hereby amended by
7 striking out of the last sentence thereof the symbol and figures
8 "Sec. 105-132." and inserting in lieu thereof the symbol and
9 figures "Sec. 105-135 (9)."

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COMMENT:

G. S. 105-114 as amended effective July 1, 1968 incorporates a definition of "income year" found in §105-132.

§ 105-114. **Nature of taxes; definitions.**—The taxes levied in this article upon persons and partnerships are for the privilege of engaging in business or doing the act named. The taxes levied in this article upon corporations are privilege or excise taxes levied upon:

(1) Corporations organized under the laws of this State for the existence of the corporate rights and privileges granted by their charters, and the enjoyment, under the protection of the laws of this State, of the powers, rights, privileges and immunities derived from the State by the form of such existence; and

(2) Corporations not organized under the laws of this State for doing business in this State and for the benefit and protection which such corporations receive from the government and laws of this State in doing business in this State.

The term "corporation" as used in this article shall, unless the context clearly requires another interpretation, mean and include not only corporations but also associations or joint-stock companies and every other form of organization for pecuniary gain, having capital stock represented by shares, whether with or without par value, and having privileges not possessed by individuals or partnerships; and whether organized under, or without, statutory authority. The term "corporation" as used in this article shall also mean and include any electric membership corporation organized under chapter 117, and any electric membership corporation, whether or not organized under the laws of this State, doing business within the State.

When the term "doing business" is used in this article, it shall mean and include each and every act, power or privilege exercised or enjoyed in this State, as an incident to, or by virtue of the powers and privileges acquired by the nature of such organizations whether the form of existence be corporate, associate, joint-stock company or common-law trust.

If the corporation is organized under the laws of this State, the payment of the taxes levied by this article shall be a condition precedent to the right to continue in such form of organization; and if the corporation is not organized under the laws of this State, payment of said taxes shall be a condition precedent to the right to continue to ~~engage in~~ doing business in this State. ~~The taxes levied in this article or schedule shall be for the fiscal year of the State in which said taxes become due.~~ (1939, c. 158, s. 201; 1943, c. 400, s. 3; 1945, c. 708, s. 3; 1965, c. 287, s. 16.)

SESSION LAWS—1967

CHAPTER 286

AN ACT TO AMEND ARTICLE 3 OF CHAPTER 105 OF THE GENERAL STATUTES TO MAKE THE DUE DATE FOR CORPORATION FRANCHISE TAX RETURNS COINCIDE WITH THE DUE DATE OF CORPORATION INCOME TAX RETURNS AND TO MAKE CERTAIN OTHER CHANGES IN THE CORPORATION FRANCHISE TAX LAWS.

The General Assembly of North Carolina do enact:

Section 1. The Franchise Tax Article of the Revenue Act, being Article 3 of Subchapter I of Chapter 105 of the North Carolina General Statutes is hereby amended by:

(a) Changing the period (.) at the end of the last paragraph of G. S. 105-114 to a semicolon (;) and adding the following: "except, that the taxes levied in § 105-122 and 123 shall be for the income year of the corporation in which such taxes become due. For purposes of this Article the words 'income year' shall mean an income year as defined in § 105-132."

However §105-132's provisions have been transferred to §105-135.

§ 105-132: Transferred to § 105-135 by Session Laws 1967, c. 1110, s. 3.

In §105-135(9) is the definition of "income year" sought to be incorporated.

§ 105-135. **Definitions.** — For the purpose of this division, and unless otherwise required by the context:

(9) The words "income year" or "taxable year" mean the calendar year or the fiscal year upon the basis of which the net income is computed under this division; provided, that if no fiscal year has been established, they mean the calendar year, except that in the case of a return made for a fractional part of a year under the provisions of this division or under rules or regulations prescribed by the Commissioner of Revenue, the words "income year" or "taxable year" mean the period for which such return is made.

Changing the reference "§105-132" to "§105-135(9) clarifies the reference and eliminates a step in looking for the proper definition.

10 Sec. 7. G.S. 106-65.23 as the same appears in the 1967
11 Supplement to the General Statutes is hereby amended by deleting
12 from the first sentence of the fourth paragraph thereof,
13 immediately after the word "Committee" and before the phrase "in
14 addition to conducting hearings", the words "in addition to the
15 duties imposed by G. S. 106-65.36."

COMMENT:

G. S. §106-65.23 prescribes the duties of the Structural Pest Control Division of Department of Agriculture.

§ 106-65.23. Structural Pest Control Division of Department of Agriculture created; Director; Structural Pest Control Committee created; appointment; terms; quorum.—

It shall be the duty of the Structural Pest Control Committee (in addition to the duties imposed by G.S. 106-65.36) in addition to conducting hearings relating to the suspension and revocation of licenses issued under this article, and in addition to making rules and regulations pursuant to G.S. 106-65.29, to report annually to the Board of Agriculture the results of all hearings conducted by the Committee and to report the financial status of this Division of the Department of Agriculture.

including duties imposed by G. S. 106-65.36 which is not now an enacted statute. The likely explanation is that 106-65.36 was one of the sections of the bill that was deleted in the process of getting through the General Assembly.

16 Sec. 8. G.S. 53-43(1) is hereby amended by striking out
17 the word "it" in the first line thereof and inserting in lieu
18 thereof the word "its".

COMMENT:

As G. S. 53-43(1) now stands

§ 53-43. General powers.—In addition to the powers conferred by law upon private corporations, banks shall have the power:

(1) To exercise by it board of directors, or duly authorized officers and agents, subject to law, all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security or real and personal property. Such corporations at the time of making loans or discounts may take and receive interest or discounts in advance.

the possessive form of the word "it" which was obviously intended is not employed. This amendment would rectify that minor error.

19 Sec. 9. G.S. 90-108, as the same appears in the 1967
20 Cumulative Supplement to the General Statutes is hereby amended
21 by striking out of the seventh line thereof, immediately after
22 the word "prior", and immediately preceding the word "provided",
23 the word "hereto" and inserting in lieu thereof the word
24 "thereto".

Comment:

The present statute reads thus:

§ 90-108. Possession of hypodermic syringes and needles regulated. —No person except a manufacturer or a wholesaler or a retail dealer in surgical instruments, pharmacist, physician, dentist, veterinarian, nurse or interne shall at any time have or possess a hypodermic syringe or needle or any instrument or implement adapted for the use of habit-forming drugs by subcutaneous injections and which is possessed for the purpose of administering habit-forming drugs, unless such possession be authorized by the certificate of a physician issued within the period of one year prior hereto; provided, however, a nurse, as referred to above, shall mean one who is specifically authorized by a physician or dentist to give subcutaneous injections under the supervision or direction of such physician or dentist. (1935, c. 477, s. 19; 1965, c. 619, s. 3.)

The word "hereto" probably was intended to be "thereto" in the initial passage of the act in 1935 (Session Laws 1935, c. 477, s. 19) since the questioned word refers to the requirement for the physician's certificate to be current, ie. not more than one year old.

Changed to "thereto", the language conveys the obviously intended message ie. that for the certificate of the physician to be valid authority to possess the prescribed items, it must have been issued not longer than one year prior to such possession being questioned.

25 Sec. 10. G.S. 105-232 as the same appears in the 1965
26 Replacement Volume 2D of the General Statutes is hereby amended
27 by deleting from the fourteenth line thereof the words "clerk of
28 superior court" and inserting in lieu thereof the words "register
1 of deeds", and by deleting from the sixteenth line thereof the
2 word "clerk", and inserting in lieu thereof the words "register
3 of deeds".

Comment:

The 1967 General Assembly amended G. S. 105-230 (1967 Session

Laws, C. 823, s. 31) to substitute the register of deeds for the clerk of superior court as the official to be notified by the Secretary of State in the case of suspension of articles of incorporation for failure to file or pay taxes or fees under the revenue act.

A companion section, G. S. 105-232, which deals with reinstatement of corporation whose articles of incorporation have been suspended in accord with G. S. 105-230 was not ~~specifically~~ amended.

§ 105-232. **Corporate rights restored; receivership and liquidation.**—Any corporation whose articles of incorporation or certificate of authority to do business in this State has been suspended by the Secretary of State, as provided in § 105-230, or similar provisions of prior Revenue Acts, upon the filing, within five years after such suspension or cancellation under previous acts, with the Secretary of State, of a certificate from the Commissioner of Revenue that it has complied with all the requirements of this subchapter and paid all State taxes, fees, or penalties due from it (which total amount due may be computed, for years prior and subsequent to said suspension or cancellation, in the same manner as if such suspension or cancellation had not taken place), shall be entitled to exercise again its rights, privileges, and franchises in this State; and the Secretary of State shall cancel the entry made by him under the provisions of § 105-230 or similar provisions of prior Revenue Acts, and shall issue his certificate entitling such corporation to exercise again its rights, privileges, and franchises, and certify such reinstatement to the clerk of superior court in the county in which the principal office or place of business of such corporation is located with instructions to said clerk, and it shall be his duty to cancel from his records the entry showing suspension of corporate privileges.

When the certificate of articles of incorporation in this State have been suspended by the Secretary of State, as provided in G. S. 105-230, or similar provisions of prior or subsequent Revenue Acts, and there remains property held in the name of the corporation, or undisposed of at the time of such suspension, or there remain possibilities of reverters, reversionary interests, rights of re-entry or other future interests that may accrue to the corporation or its successors or stockholders, and the time within which the corporate rights might be restored as provided by this section has expired, any stockholder or any bona fide creditor or other interested party may apply to the superior court for the appointment of a receiver. Application for such receiver may be made in a civil action to which all stockholders or their representatives or next of kin shall be made parties. Stockholders whose whereabouts are unknown and unknown stockholders and unknown heirs and next of kin of deceased stockholders may be served by publication, as well as creditors, dealers and other interested persons, and a guardian ad litem may be appointed for any stockholders or their representatives who may be an infant or incompetent. The receiver shall enter into bond with such sureties as may be set by the court and shall give such notice to creditors by publication or otherwise as the court may prescribe. Any creditor who shall fail to file his claim with the receiver within the time set shall be barred of the right to participate in the distribution of the assets. Such receiver shall have authority to sell such property or possibilities of reverters, reversionary interests, rights of re-entry, or other future interests, upon such terms and in such manner as shall be ordered by the court, apply the proceeds to the payment of any debts of such corporation, and distribute the remainder among the stockholders or their representatives in proportion to their interests therein. Shares due to any stockholder who is unknown or whose whereabouts are unknown shall be paid into the office of the clerk of the superior court, by him to be disbursed according to law. In the event the stockholders of the corporation shall be lost or shall not reflect the latest stock transfers, the court shall determine the respective interests of the stockholders from the best evidence available, and the receiver shall be protected in acting in accordance with such finding. Such proceeding is authorized for the sole purpose of providing a procedure for disposing of the corporate assets by the payment of corporate debts, including franchise taxes which had accrued prior to the suspension of the corporate charter and any other taxes the assessment or collection of which is not barred by a statute of limitations, and by the transfer to the stockholders or their representatives their proportionate shares of the assets owned by the corporation. (1939, c. 158, s. 903; c. 370, s. 1; 1943, c. 400, s. 9; 1947, c. 501, s. 9; 1951, c. 29.)

This amendment will simply require that notice of reinstatement also be certified to the Register of Deeds as opposed to the clerk of superior court.

While the general repeal section (s. 36) of Chapter 832, 1967 Session Laws, probably repeals the requirement to file the reinstatement notice with the clerk of superior court, the better practice would surely seem to be to change the language of the statute affected.

4 Sec. 11. G.S. 113-206 as the same appears in the 1966
5 Replacement Volume 3A of the General Statutes is hereby amended
6 by deleting the numeral "3" after the word "article" in line 5 of
7 subsection (e) thereof and inserting in lieu thereof the number
8 "31".

Comment:

G. S. 113-206(e) now reads:

(e) To the extent that any application of the provisions of § 113-205 and this section is deemed to constitute a taking of private property, any claimant may apply to the Industrial Commission for the award of such damages as he may prove. The procedure governing such application shall follow as closely as feasible that set out in article 3 of chapter 143 of the General Statutes of North Carolina pertaining to tort claims against State departments and agencies, except that the limitation period upon any claims brought under the authority of this subsection is three rather than two years and the measure of damages is for any condemnation effected rather than for any tort. Where the claiming party asserts damage from the voiding of a grant or right under § 113-205 (a) and further asserts his minority or other disability subsequent to January 1, 1970, the claimant is granted a period of three years after attaining majority or after removal of the disability in which to prosecute the claim before the Industrial Commission. No claims whatever may be entertained by the Industrial Commission, however, after January 1, 1990. It is hereby directed that the amounts necessary to cover awards made by the Industrial Commission under the authority of this subsection be paid from funds available to the Department. (1965, c. 957, s. 2.)

The reference to Article 3 of Chapter 143 in the Session Laws and as codified in the General Statutes is clearly a typographical error since Article 3 deals with "Purchase and Contract Division" of the Department of Administration

ARTICLE 3.

Purchase and Contract Division.

and Article 31 deals with "Tort Claims against State Departments and Agencies" to which the statute refers.

ARTICLE 31.

Tort Claims against State Departments and Agencies.

9 Sec. 12 . G.S. 105-296(9) is hereby amended and
10 rewritten to read as follows:
11 "(9) Real property falling within the provisions of
12 G.S. 55A-16, appropriated exclusively for public parks and
13 drives."

COMMENT:

G. S. 55-11, the section erroneously referred to, deals with "organization meeting of directors" while G. S. 55A-16 deals with "public parks and drives and certain recreational corporations." This section would correct an error probably brought about by a failure to update this reference after the 1955 revision of Chapter 55.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO PROVIDE FOR INSTRUMENTS TO SECURE FUTURE ADVANCES AND FUTURE OBLIGATIONS. (GSC 255) SB 76.

The General Statutes Commission has carefully studied and reviewed this bill on a line by line basis. The framework of this bill comes in large part from similar bills introduced in 1953 and in 1955 (HB 66).

The Commission reviewed the current state of law in North Carolina and concluded that our law is sufficiently uncertain and imprecise to warrant a statute dealing with "open-end mortgages" and instruments to secure future advances.

The cases relied upon most frequently to support the validity of "open-end" instruments and future advances made pursuant to such instruments are Moore v. Ragland, 74 N.C. 343 (1876); Adams v. Piedmont Trust Co., 167 N.C. 494 (1914); Boswell v. Boswell, 241 N.C. 515 (1955); Bolton v. Bank, 186 N.C. 614 (1923). See also Note, 31 NCLR 504.

An excellent commentary on the rule in the several states appears in September, 1953 Legal Bulletin, publication of the United Savings and Loan League, in an article by Mr. Horace Russell and Mr. William Prather entitled "The Flexible Mortgage Contract."

The majority or "California" rule is adhered to in 32 states. There are 12 states and the District of Columbia which are listed as "probably" following the majority rule. The majority rule as stated in Oaks v. Weingartner, 234 P. 2d 194 (Cal. 1951), indicates that an optional advance is superior to an intervening claim if the mortgagee has no actual notice or knowledge of the intervening lien. North Carolina falls within this latter group according to Mr. Russell and Mr. Prather.

Pertinent portions of their article are set out as follows:

THE MAJORITY OR 'CALIFORNIA' RULE

The majority rule that an optional advance is superior to an intervening claim if the mortgagee has no actual notice or knowledge of the intervening lien was well enunciated by the court in the California case of *Oaks* v. *Weingartner*,[45] decided in 1951:

> Although the lien of a mortgage does not operate to secure optional advances made under the mortgage *after the mortgagee has acquired actual notice* of an encumbrance, subsequent in point of time to his mortgage so as to defeat or impair th[illegible]hts of the subsequent encumb[illegible] the mortgage does have priority o[illegible] liens subsequent to its execution and recording *to the extent of advances made without actual notice.*

It will be noted that the important distinction of the rule is the word "actual."[46] In California and 31 other states, either the statutes provide or the courts have held that the only way for the priority of optional future advances to succumb to intervening liens is for the intervening lienor to prove that the mortgagee had *actual* notice or knowledge of the intervening lien at the time the advance was made. As mentioned earlier, in this group of states record alone does not constitute actual notice and is not sufficient to subordinate the priority of later advances. The following states follow the majority rule:

Alabama	Montana
California	Nebraska
Colorado	Nevada
Connecticut	New Jersey
Florida	New Hampshire
Georgia	New York
In[illegible]a	North Dakota
I[illegible]	Oregon
K[illegible]ky	Rhode Island
Louisiana	South Carolina
Massachusetts	Texas
Maine	Vermont
Maryland	Virginia
Minnesota	Washington
Mississippi	West Virginia
Missouri	Wisconsin

PROBABLY FOLLOW THE MAJORITY OR 'CALIFORNIA' RULE

Although the decisions are few, inconclusive or incomplete in these states and many times based on poorly drafted contracts, it is our opinion that given a properly drawn open-end mortgage contract, the courts would uphold the priority of optional future advances in the absence of actual notice of intervening incumbrances. However, even though existing court decisions favor the superiority of the optional advance, many prudent lenders in this group of states will require a title search in the absence of a decision both clearly defined and directly in point, although an affidavit is usually relied upon where the advances are for relatively small amounts.

In several of these states where there is little or no litigation on the subject, our first suggestion is a test case to determine the present law. If it is held that optional future advances under a properly drafted open-end mortgage are superior to intervening liens, this should settle the matter. If it is held to the contrary, then we suggest legislation on the subject (for which see suggestion on page 110). The states in this group are:

Arizona	North Carolina
Arkansas	Oklahoma
Delaware	South Dakota
D. of Columbia	Tennessee
Idaho	Utah
Kansas	Wyoming
New Mexico	

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NORTH CAROLINA—PROBABLY MAJORITY RULE

Although cases in point are few, in *Moore* v. *Ragland*, 74 N. C. 343, the court held: "It is clear that a man may lawfully mortgage his property to secure future and contingent debts . . . [and that the mortgagee's rights are not affected by a prior unregistered mortgage]." The same result was reached in *Todd* v. *Outlaw*, 79 N. C. 216, except that a defectively recorded mortgage was concerned. In the latter case the court said: ". . . to the extent of the payments made by the [mortgagees under the validly recorded mortgage] *before notice* of the defendant's equity, the legal title acquired by them will protect and secure them. If, after the execution of the mortgage to the plaintiffs and before they had made any part of, or all the advancements stipulated, they *had been fixed with notice* of defendant's equity, any advancements subsequently made by them would have been made at their peril . . . but as plaintiffs were unaffected with notice before they paid out their money, the legal title must prevail as a security for repayment."

The question as to the effect of record notice where both mortgages have been properly recorded has not been directly litigated, although it is believed the actual notice rule would probably be upheld. See *Insurance Company* v. *Knox*, 220 N. C. 725, where it was held that the registration of a mortgage is "constructive notice of all matters which would be discovered by reasonable inquiry . . . (1) has the mortgage debt been kept in date by payments?"

The intent should be spelled out and a maximum limit to the advances should be included in the mortgage. See *Belton* v. *Bank*, 186 N. C. 614, where the court said that "an agreement to secure one or more obligations must be confined to those intended to be secured by the parties to the contract, for nothing not within the contemplation of the parties will be included in any such agreement." See also *Weathersbee* v. *Farrar*, 97 N. C. 106, 1 SE 616, where even advances that appeared necessary to save the security were disallowed because not provided for in the loan contract.

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This bill in its present form was studied at length and modified from the 1955 version by the General Statutes Commission. It creates a new Article 7 in Chapter 45 of the General Statutes, entitled "Instruments to Secure Future Advances and Future Obligations.

Section 45-67 operates to limit the article's application to security instruments relating exclusively to real property.

Section 45-68 states the essential requirements for an instrument to come within the purview of the article's special treatment. Those requirements are that the instrument must show:

1. That it is given to secure future obligations.

2. The amount of present obligations secured.

3. The maximum amount of present and future obligations which may be secured at any one time.

4. The period during which future obligations may be incurred.

5. That the period is less than ten (10) years beyond date of instrument, and that each obligation be evidenced by a written instrument or notation, signed by the obligor, stipulating that the obligation is secured by such future obligations instrument and that the amount, date and due date of each evidence of indebtedness is noted in writing on the security instrument when the evidence of debt is issued.

Section 45-69 permits further advances to be made from time to time subject to the limitation as to the maximum amount secured. These subsequent advances are secured to the same extent as if made at the same time as the original advance.

Section 45-70 deals with the lien priorities to be accorded loan transactions executed in compliance with this article.

(a) states the rule for any instrument on its face providing for obligatory advances - that is, their lien priority shall date as if the advances were made at the time of execution.

(b) states the rule for any instrument not showing on its face that future advances are obligatory - that is, lien priority for those subsequent advances shall be the same as if made on the date of execution unless actual notice is given of an intervening lien in which case subsequent advances take priority immediately after the intervening lien with notice. Notice of intervening liens must be in writing and delivered to the secured creditor or his last recorded assignee.

(c) permits certain expenses paid for protection or preservation of the security to be secured without notice with the same priority as if paid on the date of execution of the instrument. These payments do not count toward computing the maximum amount secured.

Section 45-71 states that the maker of the security instrument or his successor in interest may require by written demand (after full repayment and termination of obligation to make further advances) that the holder enter satisfaction in writing and sign and date the entry.

Where there are evidences of debt not marked "paid" on the security instrument, the holder may require that all evidences of debt be exhibited to him marked "paid" before he makes his entry of satisfaction.

Section 45-72 permits the maker to obtain from the holder of a "non-obligatory" future advances instrument a statement stating the total amount of the advances to date and terminating future advances secured by the same security agreement. A form is set out. When recorded, it bars further future advances within the priority of the particular instrument. However, expenses to protect and preserve the collateral are permitted to be thereafter paid and to enjoy lien priority under the original security instrement.

Section 45-73 provides that cancellation shall be under the provisions of GS 45-37 except in cases of exhibition or

presentation. In those instances only those evidences of debt mentioned in the instrument or noted thereon need be exhibited or presented.

Section 45-74 states clearly the policy that this article is intended only to offer one statutorily approved procedure for executing security instruments securing future advances ("open-end instruments"). Otherwise valid open-end mortgages or future advance instruments would not be affected by enactment of this article.

C-746
(1969)

SB 113
GSC 190

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO RECODIFY AND SIMPLIFY THE LAW CONCERNING DISCHARGE OF RECORD OF MORTGAGES, DEEDS OF TRUST AND OTHER INSTRUMENTS INTENDED TO SECURE THE PAYMENT OF MONEY OR THE PERFORMANCE OF ANY OTHER OBLIGATION.

The General Statutes Commission has carefully considered over the last two years the redrafting of G. S. 45-37 which relates to discharge of record of mortgages, deeds of trust and other instruments. The motivation for this project was the consensus of the Commission that the present statutory section in its five subdivisions was poorly organized, not readily susceptible to citation as to particulars, and encumbered with many repetitions of phrases which could be more efficiently written. It was the intent of the Commission to enable a lawyer to cite with specificity and particularity the procedure and technique for discharge of record of an instrument that he intended to utilize by citing the Section Number, subsection letter and subdivision number within this rewritten section.

There was no intention and the Commission believes that it has not in any way altered or modified the present substantive law relating to release, cancellation and discharge of record of mortgages and Deeds of Trust.

The Commission has clarified the writing of the law dealing with the conclusive presumption of satisfaction presently found in G.S. 45-37(5)'s first sentence.

This conclusive presumption is contained in subsection (b) of the bill and is dealt with clearly so as to remove any doubt as to whether the presumption may be postponed for fifteen years more than once.

The proposed statute which is before you is organized in five lettered subsections (a) through (e). Subsection (a) is broken down into four numbered subdivisions (1) through (4).

Subdivision (a)(1) relates to discharge and release of record by acknowledgment of satisfaction by certain named parties to the Register of Deeds. This provision corresponds to present G.S. 45-37(1).

Subsection (a)(2) sets out the procedure for cancellation of record by exhibition of any Deed of Trust accompanied by the evidence of indebtedness to the Register of Deeds with endorsement of payment and satisfaction appearing thereon by the obligee or other appropriate person which procedure corresponds to present G.S. 45-37(2).

Subsection (a)(3) provides for cancellation by exhibiting to the Register of Deeds by the grantor or mortgagor the security instrument together with the evidences of indebtedness or by exhibition of the security instrument alone if it sets forth the obligation secured and does not call for or recite any evidence of indebtedness and if at the time the instruments are more than ten years old couuting from the maturity date of the last obligation secured. This provision corresponds to the present G.S. 45-37(3).

Subdivision (a)(4) deals with satisfaction by exhibition to the Register of Deeds of any deed of trust given to secure the bearer or holder of negotiable instruments together with all evidences of indebtedness marked paid and satisfied in full. Safeguards to protect the creditor in case of written notice of loss or theft and to protect the negotiability of instruments are included. This is the substance of the present G.S. 45-37(4).

Subsection (b) deals with the conclusive presumption of compliance with the conditions of the security instrument and other obligations as against creditors and purchasers for valuable consideration fifteen years from the date the conditions were to be performed or the date of the maturity of the last installment of the debt or interest, provided that this presumption may be postponed by an affidavit which states the amount of the unpaid debt or what other respect the instrument has not been complied with. By express limitation that is limited to a one time filing of the affidavit. Its effect is clearly enunciated "to postpone the effective date of the conclusive presumption of satisfaction to a date fifteen (15) years from the filing of the affidavit or from the making of the notation. An exemption for certain property contained in the existing statute was included. This corresponds to G.S. 45-37(5).

Subsection (c) combines the multiple references contained in the statute to microphotographic record keeping in the Office of the Register of Deeds notations. Repetitions are thereby reduced.

Subsection (d) provides that "Register of Deeds" means the Registrer or his deputy in the county in which the instrument is to be registered. This helps to shorten the statute and eliminate repetition.

Subsection (e) is designed to put to rest any doubts that this act might conflict with Uniform Commercial Code. It is the intent of the draftsmen that this act relate, as does the existing G.S. 45-37, exclusively to real property as opposed to personal property.

The only other substantive change is reference to the future advances instrument or open end mortgage authorized by SB 76, presently under consideration by Senate Judiciary #2 Committee.

By way of summary, this act is designed to codify in a more readable and more readily citable form, the existing law presently found at G.S. 45-37. We have attempted to eliminate run-on sentences, multiple provisos and repetition. Where we have failed, notably in subsection (b), we did so knowingly preferring to clarify the law rather than shorten it.

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO PROVIDE FOR THE CREATION OF A TENANCY BY THE ENTIRETY IN THE DIVISION OF LAND (GSC 247).

This proposed bill is designed to change the present case law of North Carolina with regard to the interest which may be taken by a tenant in common in real property and his or her spouse at the time of an actual partition of the land.

Under the current decisional law, where there is a partition deed or a voluntary exchange of deeds by tenants in common in pursuance of a scheme to divide the land held by them as tenants in common, and any of the deeds names the tenant and his spouse as grantees, no tenancy by the entirety is thereby created, even if they are so named with the consent of the tenant. The grantees must be jointly named and jointly entitled. There is no unity of time and title, and the grantees are not jointly named and entitled. A partition deed assigns to the co-tenant only what is already his. He acquires no title to the land by such deed. He already has title by inheritance from a common ancestor. The partition deed merely fixes the boundaries to his share so that he may hold it in severalty. SMITH v SMITH, 249 N. C. 669 (1959); COMBS v COMBS, 273 N. C. 462 (1968); 2 Lee N. C. Family Law, sec. 113, at pages 59-60.

But where there is no evidence that a voluntary exchange of deeds between tenants in common was in nature of a partition of land, there may be a conveyance by one tenant in common of his share to another tenant in common and the wife of the other tenant in common to hold as tenants by the entirety. (MORTON v BLADES LUMBER CO., 154 N. C. 278 (1911). Lee, N. C. Family Law, sec. 113, pages 59-60.

This bill permits a husband or wife who owns an undivided interest as tenant in common to create in the division, either by judicial proceeding or by exchange of cross-deeds, a tenancy by the entirety with his or her spouse.

Ch 748
1969

MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO PROVIDE FOR THE CREATION OF A TENANCY BY THE ENTIRETY IN THE DIVISION OF LAND (GSC 247).

The General Statutes Commission has carefully considered this bill.

This proposed statute changes the decisional law. Smith v. Smith, 249 N. C. 669 (1959); Combs v. Combs, 273 N. C. 462 (1968); 2 Lee, N. C. Family Law, sec. 113, at pages 59-60.

"Where there is a partition deed or a voluntary exchange of deeds by tenants in common in pursuance of a scheme to divide the land held by tenants in common, and any of the deeds names the tenant and his spouse as grantees, no tenancy by the entirety is thereby created, even if they are so named with the consent of the tenant. The grantees must be jointly named and jointly entitled. There is no unity of time and title, and the grantees are not jointly named and entitled. A partition deed assigns to the co-tenant only what is already his. He acquires no title to the land by such deed. He already has title by inheritance from a common ancestor. The partition deed merely fixes the boundaries to his share so that he may hold it in severalty.

But where there is no evidence that a voluntary exchange of deeds between tenants in common was in nature of a partition of land, there may be a conveyance by one tenant in common of his share to another tenant in common and the wife of the other tenant in common to hold as tenants by the entirety. (Morton v. Blades Lumber Co., 154 N. C. 278 (1911))."

-- from Lee, N. C. Family Law, sec. 113, pp 59-60

Safeguards against creation of a tenancy by entirety through inadvertance are inserted by requiring the intention of the spouse who was a tenant in common to be clearly shown in the deeds or in the pleadings.

Married women are accorded added protection by extending to them the private examination requirements of G.S. 52-6.

The General Statutes Commission recommends this proposed statute and urges its enactment.

The bill includes in its terms protections against a tenancy by the entirety being created through inadvertance (requirement that the intention be shown on the face of the deeds or be reflected in the pleadings in a judicial partition) and protections for the married woman tenant in common (requirement that the protection provisions of G. S. 52-6 be shown to have been complied with).

This bill makes it possible for a tenant in common in a division of land to have the same rights as in any other exchange of deeds. MORTON v LUMBER CO., supra.

In a similar situation where unity of time and title is absent, the General Assembly provided in G. S. 39-13.3 that a conveyance by a husband or wife to himself and his spouse would create a tenancy by the entirety unless a contrary intention is expressed.

The General Statutes Commission recommends this bill and urges its enactment.

C-751
(1969)

1969 Session

MEMORANDUM

SUBJECT: A BILL TO AMEND FURTHER CHAPTER 55 OF THE GENERAL STATUTES RELATING TO BUSINESS CORPORATIONS.

B73(1969)

The following additional amendments to the Business Corporation Act have been proposed.

Sections 1, 2 and 3 (G.S. 55-19, 55-20, and 55-21). These provisions broaden the power and duty of a North Carolina Corporation to provide indemnification for its directors, officers, employees and agents in the following manner:

(a) The provisions for indemnification have been expanded to include "employees" and "agents" in addition to directors and officers, and to include directors, officers, employees and agents of a subsidiary or affiliate. However, the prohibition against indemnification in 55-19(a) has not been similarly expanded; so directors and officers, as distinguished from other employees and agents, can be indemnified only to the extent provided in 55-19, 55-20 and 55-21.

(b) A provision has been added to 55-19(b) making it clear that the legal representative of a deceased director, officer, employee or agent is covered by the indemnification provision.

(c) A new subsection (c) has been added to G.S. 55-99 expressly authorizing a corporation to purchase and maintain indemnification insurance for the benefit of its directors, officers, employees or agents.

(d) A new subsection (d) has been added to G.S. 55-19 authorizing a corporation to make advance payments of expenses on behalf of a director, officer, employee or agent upon sufficient undertaking by such person to reimburse the corporation if it is ultimately determined that he is not entitled to indemnification.

(e) The provisions have been expanded to include administrative and investigative proceedings.

(f) The provisions in G.S. 55-20(a)(3)(i) has been expanded to permit a plan of indemnification to be approved by written consent of all shareholders, in lieu of approval at an actual meeting of shareholders.

(g) Paragraphs II and III have been added to G.S. 55-20(a)(3) to provide two additional means by which a corporation may indemnify a wholly or partially unsuccessful defendant.

(h) G.S. 55-20(b) have been added to negate any presumption that might otherwise arise out of the disposition of the action against the director, officer, employee or agent.

(i) The new sub-paragraph (2) of G.S. 55-21(a) has been added to allow the court to permit the indemnification of an unsuccessful defendant in a corporate action.

Section 4 and 5. The Office of the Secretary of State has suggested that cross reference be made between G.S. 55-155 and G.S. 55-156 because they frequently reserve only the fees due by the former and not the taxes due under the latter, or vice versa. These changes make such cross references.

S 93
1969

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND CHAPTER 55 OF THE GENERAL STATUTES RELATING TO BUSINESS CORPORATIONS AND CERTAIN RELATED STATUTES. (SB

The General Statutes Commission has worked over the past biennium to prepare the bill captioned above. A Drafting Committee was selected consisting of Mr. Russell M. Robinson, II, Professor E. M. Faris and Mr. Donald F. Clifford.

The Drafting Committee, working in close consultation with the General Statutes Commission has after much thought, study and discussion, concluded that this bill offers the best available answers to many problems currently prevalent in our Business Corporation Act. Throughout our consideration we have kept in mind the basis underlying concepts and philosophies on which our Business Corporation Act was originally based.

The commentary which follows is the product of the Drafting Committee. It's purpose is to explain the problems sought to be dealt with, to set out the particular solution chosen and to clearly explain the reasons for our choice of solutions.

We have proceeded on a section by section basis, keyed to the text of the bill itself.

Section 1 (G. S. 55-6)

The Committee feels that there is no practical reason to require more than one incorporator to sign and file the Articles of Incorporation. This Amendment therefore eliminates the present requirement of having three or more incorporators. Most of the newer corporation statutes in other states have eliminated the older requirement of multiple incorporators; and the Committee recommends that this change be made in the North Carolina statute to keep it in line with the modern trend and to simplify the incorporation process. See, e.g., S. C. Code §12-14.2 and N. Y. Bus. Corp. Law §401. Cf. Section 10 below. The Committee does not, however, recommend the further step of removing the requirement that the incorporator or incorporators be natural persons.

Section 2 (G. S. 55-7(9))

Section 10 of this bill would amend G. S. 55-25(a) to permit a North Carolina corporation to have only one or two directors in certain circumstances. The changes proposed by this Section 2 would make the language of G. S. 55-7(9) consistent with such provision.

Section 3 (G. S. 55-11)

G. S. 55-11 as presently written states that "an organization meeting of the board of directors named in the Articles of Incorporation shall be held". This language leaves room for the argument that an actual meeting of the initial board of directors is necessary to complete the organization of a corporation. The Committee feels that this was not intended and that the statute should be amended to provide specifically that a corporation may complete its organization by informal action without an actual meeting of the directors, as permitted by G. S. 55-29. See, e.g., N. Y. Bus. Corp. Law §404.

Section 4 (G. S. 55-12(c))

This section simply adds the words "or registered by" after the word "reserved" in the next to last line of the section to make G. S. 55-12(c) consistent with the new provision in G. S. 55-12(h). See Section 6 below.

Section 5 (G. S. 55-12(f))

This section adds to G. S. 12(f) a provision requiring an application for reservation of a corporate name to state the name and address of the applicant, since such information would be needed by the Secretary of State to give notice of a hearing to revoke such reservation. See Section 6 below.

Section 6 (G. S. 55-12(h) and (i))

This section adds two new subsections to G. S. 55-12, dealing with corporate names.

First, the North Carolina statute does not now provide any convenient or inexpensive procedure by which a foreign corporation that has not yet expanded into North Carolina, but which plans to do so in the future, may preserve the availability of its corporate name in this State until such future time. Eighteen other

states, including Georgia, South Carolina, Tennessee and Virginia, now have statutes which permit registration (as distinguished from reservation) of a corporate name under such circumstances; and the Committee recommends the enactment of such a provision as set forth in the proposed G. S. 55-12(h). See, e.g., S. C. Code §12-13.3 and Va. Code Ann. §13.1-8.

Second, the Committee recommends the enactment of G. S. 55-12(i), which will permit the Secretary of State to revoke any reservation or registration of a corporate name if he finds, after a hearing, that the circumstances which originally justified the same do not then exist. For example, if a foreign corporation that has registered its name for future use in this State ceases to do business or continue in good standing in its state of incorporation, its registration in North Carolina may be revoked.

<u>Section 7</u> (G. S. 55-17(b)(3))

G. S. 55-17(b)(3) presently permits a North Carolina corporation to enter into a contract of guaranty "for the benefit of its personnel or customers or suppliers." Such listing of persons whose obligations can be guaranteed by a North Carolina corporation may be construed to render ultra vires any guaranty made for the benefit of persons who do not fall within the three categories expressly mentioned - e.g., the intercorporate guaranty between parent-subsidiary or affiliated corporations whose business interests are interrelated. Consequently, the Committee feels that the section should be amended to permit a corporation to guarantee the obligations of "any person, firm or corporation". Such corporate power would still be limited by the general provision of G. S. 55-17(b) that it be exercised only "in connection with carrying out the purposes stated in its charter" and by the provisions of G. S. 55-22. Subject to such limitations, the Committee sees no objection to giving a corporation unlimited power to enter into contracts of guaranty.

<u>Section 8</u> (G. S. 55-17(b)(4))

The Committee feels that present G. S. 55-17(b)(4), authorizing a North Carolina corporation to purchase insurance on the life of, and giving it an insurable interest in, its

employees and officers, is not sufficiently broad. For example, it does not cover the rather common case of a close corporation which wishes to insure the lives of its shareholders to fund a redemption agreement effective on the death of a shareholder, perhaps for the purpose of withdrawing funds from the corporation under the special tax treatment of 1954 IRC §303. The proposed amendment would therefore broaden the statutory provision by authorizing a corporation to insure "physical or mental ability" and to procure insurance for the purpose of redeeming the securities of any security holder at his death or disability. For these purposes the corporation is expressly given an insurable interest in its officers, employees and security holders. In addition, a corporation is authorized to provide insurance on any other person in whom it may otherwise have an insurable interest.

Section 9 (G. S. 55-22)

This amendment is one of clarification only, and makes no substantive change. The present statute provides that certain loans and guaranties can be made either (a) "with the consent of all the shareholders, regardless of their adverse interests or voting rights," of (b) "with the consent of the holders of a majority of all the shares outstanding, regardless of limitation on voting rights, other than the shares held by the adversely interested party". The Committee feels that this language is cumbersome and confusing because it appears to require the consent of all the shareholders in the clause quoted as (a) and then, as an alternative, permit the consent of less than all the shareholders in the clause quoted as (b). The Committee believes that the intent of the statute was, in the normal situation where there are some shareholders who are not adversely interested, to require the consent of a majority of all shares except those held by adversely interested parties (clause (b)); and to permit the transaction to be approved by all shareholders in the unusual case where all shareholders are adversely interested (clause (a)). The proposed amendment would clarify that intent.

Section 10 (G. S. 55-25(a))

This amendment would permit a North Carolina corporation to have fewer than three directors but not fewer than the number of

record shareholders. Thus, the Articles of Incorporation could name one or more directors to the initial board of directors; but after the issuance of shares the corporation would have to have at least as many directors as it has shareholders up to three. See, e. g., Del. Code Ann. tit. 8, §141(b). Cf. Section 1 above.

<u>Section 11</u> (G. S. 55-25(f))

This is simply a cross-reference section. No substantive change in or addition to the statute is intended.

<u>Section 12</u> (G. S. 55-28(d))

This amendment simply corrects an oversight in the statute. The last sentence of G. S. 55-28(d) presently provides that directors act by a majority of the directors present at a meeting unless the act of a greater number is required by the charter or the bylaws; but the statute itself requires the act of a greater number in some instances. See, e.g., G. S. 55-16(b) (majority of the directors then holding office). The proposed amendment would recognize this additional exception by adding the words "by this chapter" to the excepting clause.

<u>Section 13</u> (G. S. 55-31)

This section rewrites G. S. 55-31 for several purposes: (1) to make it clear that the board may designate committees other than the executive committee; (2) to eliminate the requirement that the charter or bylaws affirmatively authorize the designation of committees; (3) to define more clearly the matters on which committees shall not have authority to act; and (4) to define more clearly the procedures by which a committee or any member thereof may be discharged or removed.

First, the present statute does not explicitly authorize the appointment of committees other than an executive committee, although there is strong indication that such practice is lawful in North Carolina. See G. S. 55-29(a). Since it is a common practice for boards to appoint both standing and special committees for a variety of purposes, the point should be clarified.

Second, the Committee feels that there is no reason to require affirmative charter or bylaw authorization for the designation of a committee. If the charter or bylaws do not contain such

affirmative authorization, the board of directors could, and would be required to, go through the two-step process of first amending the bylaws to authorize the designation of the committee and then designating it. This is a needless technicality that serves no useful purpose and, if overlooked by the board, might create doubt about the validity of action taken by committees that were otherwise properly constituted. The shareholders of the corporation can limit the authority of the board to designate committees either by a provision in the charter or in a bylaw adopted by the shareholders.

Third, certain matters are put beyond the authority of any committee of the board of directors so that action thereon must be taken by the board itself. The specific language of the proposed amendment to this effect is derived in part from the amended Section 38 of the Model Business Corporation Act and in part from Section 712 of the New York Business Corporation Law. The Drafting Committee feels that these restrictions do not represent any substantial departure from present law in North Carolina.

Section 14 (G. S. 55-37.1)

This proposed new section is a verbatim adoption of Section 224 of the new Delaware General Corporation Law.

Section 15 (G. S. 55-40(c))

The North Carolina statute presently provides that a "dividend credit" must be accrued for "noncumulative" preferred shares to the extent that the corporation has earnings allocable to such shares. G. S. 55-40(c) and 55-2(5). Thus, the statute in effect prohibits the issuance of truly noncumulative preferred stock by a North Carolina corporation and makes all such stock cumulative-to-the-extent earned.

The Committee feels that this is a very bad provision and strongly recommends its repeal. Noncumulative preferred stock is a useful and legitimate financing device. For example, in estate planning for the close family corporation such stock is

often used to limit the participation of the older generation in the equity growth of the business (without saddling it with an unwanted "dividend credit"), thereby transferring such growth to the younger members of the family; and, in the case of larger corporations, particularly in the case of a merger or other acquisition, flexibility in corporate planning has become increasingly important in the more imaginative and sophisticated financial atmosphere currently prevailing. The unavailability of such devices in North Carolina severely inhibits estate and corporate planning and is, in the opinion of the Committee, not justified by the need to protect some unwary investor against being cheated by the rare and outmoded "windfall dividend" scheme perpetrated by unscrupulous directors. If that happens, the defrauded stockholder would probably have adequate remedy through the equitable jurisdiction of the court.

The proposed new G. S. 55-40(c) is not intended to change the status or characteristics of any class of preferred shares which has been issued either wholly or in part. Prior to the effective date of the Business Corporation Act (July 1, 1957), truly noncumulative preferred stock was not prohibited in North Carolina; and the Act therefore provided that the "dividend credit" concept would apply only to noncumulative preferred shares of a class which had not been issued either wholly or in part until after the statute became effective. Consequently, the proposed amendment provides that dividend credits will accrue only on noncumulative preferred shares of a class out of which shares were initially issued between June 30, 1957 and October 1, 1969. The Committee recognizes that this raises the possibility that a charter provision or resolutions fixing the characteristics of shares may have been adopted during that period describing the class as "noncumulative" with the intent that it would actually be cumulative-to-the-extent earned under the then current statutory provision. Such intent would be defeated if no shares were issued out of the class until after September 30, 1969; but the Committee feels that such possibility does not justify the complex statutory provision that would be required to cover the situation. In such a case, if cumulative-to-the-extent earned

preferred shares are still desired, the charter or resolutions would have to be amended after September 30, 1969, to make express provision for that result.

Section 16 (G. S. 55-40(d))

The proposed amendment simply rewrites this subsection to make it consistent with the amendment of G. S. 55-40(c). See Section 15 above.

Section 17 (G. S. 55-40(e))

See the comment under Section 23 below.

Section 18 (G. S. 55-43(e))

See the comment under Section 23 below.

Section 19 (G. S. 55-44.1)

The North Carolina statute does not contain any provision authorizing the charter to grant voting or other shareholder rights to the holders of debt securities. Such a provision is found in the statutes of the most significant commercial judisdictions; and the Committee recommends its adoption in North Carolina to permit greater flexibility in the issuance of debt securities, particularly in the case of large corporations which may wish to give contingent voting rights to bond holders. See, e.g., Cal. Corp. Code §306; Del. Code Ann. tit. 8, §221; N. Y. Bus. Corp. Law §518(c).

Section 20 (G. S. 55-46(a)(1))

The proposed amendment would eliminate the present requirement that money or property paid as consideration for shares be "actually received by the corporation", and would provide instead that shares may be issued for money or property "received by, or inuring to the benefit of, the corporation". The Committee recommends this liberalization of the statute to permit a parent corporation to issue its shares upon the merger of its subsidiary with another corporation. Such a merger can qualify as a "tax-free" reorganization under newly enacted Section 368(a)(2)(D) if, but only if, shares of the parent are issued without any issuance of shares by its subsidiary.

Section 21 (G. S. 55-49(d))

A technical flaw in the present statutory definition of earned surplus is that it does not make allowance for all trans-

fers from capital surplus to earned surplus; it only provides that earned surplus shall be recomputed "from the latest date when a deficit was eliminated by an application of its capital surplus as permitted by subsection (i) of this section." To illustrate, if a deficit were only reduced, not eliminated, by an application of capital surplus, the net profits would still be computed from the date of incorporation; and the effect of the deficit reduction would be lost completely. It was patently not the intent of the definition in subsection (d) to render meaningless a deficit reduction expressly authorized by subsection (i); and the proposed amendment to subsection (d) corrects this flaw by providing that all transfers made from capital surplus as permitted by subsection (i) will be added in computing earned surplus.

Section 22 (G. S. 55-50(g)(2))

The proposed amendment recognizes that an earned surplus may arise, at least in part, from the reduction, as well as the elimination, of a deficit by a transfer from capital surplus as permitted by G. S. 55-49(i); and it also expands from one year to three years the time for disclosing that dividends are being paid from an earned surplus account whose deficit had been eliminated by such a transfer.

Section 23 (G. S. 55-52(b)(4))

The Business Corporation Act presently provides, in effect that a North Carolina corporation cannot grant a shareholder an option to require it to redeem its shares. This general rule is subject to the exception in G. S. 55-52(b)(4) which allows a corporation "to perform its agreement with an employee who has purchased from the corporation shares under an agreement relating to employment which obligates or entitles the corporation to repurchase them". Such provision also permits the corporation to make such purchase by action of its board of directors without shareholder approval and regardless of any impairment of stated capital. In the opinion of the Committee this provision is too narrow because it does not cover (a) shares owned by a former employee (e.g., one who has just died or terminated his employment), (b) shares not acquired from the corporation and (c) redemption agreements effective upon the death or disability of a shareholder. The proposed amendment would expand

the provision to cover those situations. Cf. Sections 17 and 18 above.

Section 24 (G. S. 55-52(c)(1))

This section as presently written authorizes a purchase of shares by a corporation "prorata from all its shareholders". Thus, literally applied, the provision would require that the actual purchases be made prorata from all shareholders; whereas the Committee feels that it would be sufficient, and was probably intended, that only the offers to purchase be made prorata to all shareholders. The proposed amendment makes that change.

Section 25 (G. S. 55-52(c)(2))

The North Carolina statute contains two separate provisions relating to the acquisition of listed shares. The first provision is G. S. 55-52(c)(2), which was included in the Act as originally passed and permits a North Carolina corporation to purchase its shares on an organized securities exchange if the directors have been authorized so to purchase by the prescribed shareholder vote. This provision also requires that the purchase be made through the exchange, so a purchase of listed shares directly from the holder thereof in an off-the-market transaction would not be covered. The second provision is G. S. 55-52(c)(6), which was added to the Act by amendment in 1963. This second provision, as it relates to listed shares, completely supersedes the originally enacted clause and is broader than that original clause in that it does not require shareholder authorization and does not limit the purchases to transactions effected through the exchange. Also, the second provision was further amended in 1967 by the addition of provision permitting purchases by "a corporation which is subject to and regulated by the Securities Act of 1933 as amended".

The Committee recommends that these confusing and overlapping provisions be consolidated into one simple provision authorizing any corporation to purchase its shares which are listed on an organized securities exchange. The Committee feels that the rules of such exchanges, together with the federal securities legislation and regulations, furnish adequate protection against abuses.

Section 26 (G. S. 55-52(c)(3))

This provision presently requires authorization "by a vote of a majority of the holders of the class of shares" - that is, the required majority is measured in terms of the holders of the shares rather than the shares themselves (percapita voting). The Committee feels that this was not intended; and it therefore recommends that the provision be amended to require authorization "by a vote of a majority of the shares".

Section 27 (G. S. 55-52(d))

G. S. 55-52(d) is intended to prevent a corporation from circumventing the protective limitations of subsections (b) and (c) by acquiring its outstanding shares indirectly through its subsidiary. However, the statute is broader than necessary because it prohibits a subsidiary from acquiring the shares of its parent directly from the parent. The Committee feels that there is no reason for such latter prohibition; and the proposed amendment would therefore permit such acquisition.

Section 28 (G. S. 55-53(f))

This section presently provides that a transferee of watered shares shall not be liable thereon if he acquired them in good faith without notice that they were watered or acquired them from a transferor similarly free from liability. Thus, a holder of watered shares could relieve himself of liability therefor by passing them through an innocent party and reacquiring them. The proposed amendment would add a sentence to this section prohibiting such result. Cf. Uniform Commercial Code §3-201

Section 29 (G. S. 55-56(c))

The introductory paragraph of G. S. 55-56(c) now provides that there shall be no pre-emptive rights "with respect to" certain shares. This is ambiguous in that the phrase "with respect to" could refer either (a) to shares already issued, with respect to which there would be no pre-emptive rights upon a further issuance of shares or (b) to shares to be issued, with respect to which the holders of outstanding shares would have no pre-emptive rights. The suggested amendment makes it clear that the latter meaning was intended.

Section 30 (G. S. 55-56(c)(1))

Pre-emptive rights presently do not apply to shares issued "to obtain all or a portion of the capital required to initiate the enterprise." This is a rather uncertain standard for determining the existence of pre-emptive rights; and the foregoing amendment is intended to eliminate that uncertainty by providing specifically that there shall be no pre-emptive rights to acquire shares issued within one year, or to be issued within one year, after incorporation. See S. C. Code §12-16.21(d)(4); N. Y. Bus. Corp. Law §622(e)(5).

Section 31 (G. S. 55-56(c)(7))

This section adds a new subdivision (7) to tie into the new G. S. 55-56(g). See section 32 below.

Section 32 (G. S. 55-56(g))

The present statute does not specify any procedure for offering pre-emptive rights to shareholders nor for determining when such rights have expired or been waived by failure of the shareholders to exercise them. This section would eliminate that deficiency by adding a new subsection (g) to provide that the holders of shares entitled to pre-emptive rights must be given not less than twenty nor more than one hundred eighty days' written notice of the proposed sale of shares subject to such rights and must be given a period of not less than fifteen days within which to exercise such rights. If the rights are not exercised within such period, they shall be deemed to have been waived and the shares may be sold free of any pre-emptive right. See S. C. Code 212-16.21(b)(9)(g); N. Y. Bus. Corp. Law §622(g) and (h).

Section 33 (G. S. 55-63(c))

This proposed amendment clarifies two uncertainties in the present statute. First, it makes it clear that the shareholders may act under this section without a formal meeting on matters that are required (as well as those that are permitted) to be taken at a meeting of the shareholders; and, second, it makes it clear that a written consent by the shareholders may be signed and filed either before or after the action so taken.

Section 34 (G. S. 55-67(b))

The present second paragraph of G. S. 55-67(b) was added by amendment in 1959; and the Committee feels that it is ambiguous and needlessly cumbersome. The Committee also feels, though, that there should be some restrictions on the power of a corporation to vote its own shares that are held by it in s fiduciary capacity. The recommended amendment constitutes a compromise between completely disfranchising such shares and permitting them to be voted without restriction by the corporate fiduciary. Thus, the proposed amendment states a general rule that shares of its own stock held by a corporation in a fiduciary capacity shall not be voted; and it then states two exceptions to that rule - first, that such shares can be voted as directed by some person other than the trustee if the instrument establishing the trust so provides; and second, that if the corporation is not the sole trustee, then such shares may be voted by the other fiduciary or fiduciaries. See Va. Code Ann. §13.1-32.

Section 35 (G. S. 55-67(c))

This proposed amendment clarifies the probable intent of the Act to provide for the election of directors by a plurality of the votes cast. See N. Y. Bus. Corp. Law §614(a).

Section 36 (G. S. 55-101(a)(12))

In view of the fact that debt securities having voting rights under the proposed new G. S. 55-44.1 would be similar to preferred shares, the Committee recommends that the same shareholder vote be required for a charter amendment conferring voting rights on the holders of debt securities as is required for a charter amendment authorizing a new class of prior preferred shares.

Section 37 (G. S. 55-106(b)(4))

The needs of the parties in corporate acquisitions frequently call for the distribution of various combinations of cash, securities and other property in a statutory merger; and such distributions can usually be made in a "tax-free" reorganization under Section 368(a)(1)(A) of the Internal Revenue Code.

Also, a currently popular and convenient type of corporate acquisition involves the issuance of the shares of a parent corporation in the merger of its subsidiary with the merging corporation; and such a "three-cornered merger" can now be characterized as a "tax-free" reorganization under Section 368(a)(2)(D) of the Code. The proposed amendment makes it clear that such procedures are permissible for North Carolina corporations. See Del. Code Ann. Section 251(b)(4).

Section 38 (G. S. 55-107(b)(3))

This section proposes the same amendments for the consolidation procedure as Section 37 does for the merger procedure.

Section 39 (G. S. 55-113(j))

The North Carolina statute does not clearly state whether a registered shareholder may dissent and demand appraisal rights for less than all of his shares. The Committee feels that a shareholder should not be permitted to exercise a right of dissent and appraisal with respect to less than all of the shares owned beneficially by him; but a registered owner holding shares for several beneficial owners (e.g., a broker holding such shares in street name) should be permitted to follow the varying instructions of such owners and dissent or not dissent with respect to all of the shares belonging to each such owner. The proposed amendment is intended to accomplish that result. Se N. J. Bus. Corp. Act §14A:11-1.

Section 40 (G. S. 55-137(c))

The statute presently provides that a foreign corporation which has a corporate name similar to one already in use in this state may nevertheless be authorized to transact business in this state if (1) the Secretary of State finds that the similarly named corporations are engaged in dissimilar types of business and (2) the first corporation in the state consents in writing to the admission of the second corporation under the similar name. The proposed amendment would make three changes in this procedure.

First, it would extend the provisions of the section to corporate names that are "the same as" in addition to those that are "similar to" names already in use.

Second, it would eliminate the requirement of consent by the corporation already using the same or similar name and would vest the Secretary of State with the power to admit the foreign corporation upon a finding "that the public is not likely to be confused or deceived" and, in the discretion of the Secretary of State, upon the condition that the foreign corporation agree to add to its corporate name words indicating the jurisdiction of its incorporation. The Committee recommends the elimination of the requirement of consent by the first user of the same because it opens the possibility of an unconscionable "holdup" of a foreign corporation which should, in fairness, be admitted to operate a dissimilar business. The issue of fairness and confusion should be determined by the Secretary of State as an independent arbiter. See N. Y. Bus. Corp. Law §302(a)(3).

Third, it would add a provision permitting a foreign corporation to do business in this state under an assumed name if it could not be admitted under its regular corporate name. See Va. Code Ann. §13.1-104. Under the present law in such a situation the corporation would either be completely barred from doing business in North Carolina or would have to operate through a subsidiary.

Section 41 (G. S. 55-138(a)(2))

See comment under Section 35 above.

Section 42 (G. S. 55-156(b))

No-par stock can be a useful device in corporate planning, but it is seldom used in North Carolina because it is treated as $100 par value stock for tax purposes under G. S. 55-156(b). Thus, for example, only 1,000 shares of no-par stock can be authorized for the $40 minimum tax. The Committee therefore recommends that this section be amended to provide that no-par stock will be treated as $1 par value stock for tax purposes, thus allowing a greater number of shares to be authorized for the same amount of tax. This should not reulat in any loss of revenue to the state.

Section 43 (G. S. 55-155(a)(1))

This section simply amends G. S. 55-155(a)(1) to provide a fee for tiling an application to register a corporate name or renew such registration under the new G. S. 55-12(h). See Section 5 above.

Section 44 (G. S. 58-204)

This is simply a clarifying amendment to make it plain that the "stock, share or interest" referred to in G. S. 58-204 means such an interest "in any corporation, partnership or business association".

Section 45

This section repeals the following provisions of the Business Corporation Act:

(G. S. 55-49(h))

This subsection provides that any transfer from earned surplus to capital surplus without a stock dividend must be approved by a majority vote of the common shares. In view of the fact that there is no practical difference between such a transfer with a stock dividend and such a transfer without a stock dividend (except that the corporation may be forced to increase its authorized capital to permit the stock dividend), the Committee feels that this provision is an unnecessary and excessive restriction on the power of the directors to manage the financial policy of the corporation.

(G. S. 55-50(i))

The most severely criticized and, in the opinion of the Committee, the most undesirable provision in the Business Corporation Act is G. S. 55-50(i), which permits the holders of twenty per cent of the shares of a corporation to force the corporation to pay out one-third of its net profits in dividends every year. No other state has such a provision. It prescribes a mechanical and inflexible rule which (a) is unnecessary in the light of other remedies available to minority shareholders and (b) makes it difficult, and sometimes impossible, for a corporation to prosper and expand through internal growth. The larger publicly held corporations were exempted from this provision by an amendment in 1965; but, ironically, it is the younger and smaller corporation that frequently is more seriously threatened by the provision. Many such corporations do not have access to adequate capital from outside sources such as banks and the public

securities market; so their expansion must be financed, if at all, by retained earnings. The constant threat of a mandatory dividend that would forestall such growth, without regard to the equities of the case, is a drastic and misdirected cure for an evil that has other remedies.

Minority shareholders can be unfairly treated in an infinite number of ways. No two situations are exactly alike; and the remedy granted in each such instance should be carefully tailored to meet the particular circumstances of the case and provide fair treatment for all parties. An arbitrary statutory dividend policy obviously cannot serve that function; but a court exercising equitable jurisdiction clearly can. The North Carolina law in this respect, both statutory and judicial, is more favorable to minority shareholders than in most other American jurisdictions. See, e.g., G. S. 55-50(k). Therefore, the Committee strongly recommends that the mandatory one-third dividend statute be repealed to leave the matter of protecting minority shareholders in the equity jurisdiction of the court (where it belongs) and to leave the legitimate dividend policy of growing North Carolina corporations to the good faith discretion of their directors (where it belongs).

(G. S. 55-52(c)(6))

See comment under Section 25 above.

(G. S. 66-70)

The assumed name statute was rewritten in 1951 to make it expressly applicable for the first time to corporations; but, unfortunately, the legislature failed to delete or modify the provision of G. S. 66-70 that "this article shall in no way affect or apply to any corporation..." This obvious oversight left an irreconcilable conflict in the provisions of the statute. The Committee therefore recommends that the section be repealed.

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MEMORANDUM

A BILL TO BE ENTITLED AN ACT TO AMEND CHAPTER 55 OF THE GENERAL STATUTES RELATING TO BUSINESS CORPORATIONS SO AS TO PROVIDE FOR INDEMNIFICATION OF CERTAIN PERSONS, THE PURCHASE OF INDEMNIFICATION INSURANCE, AND CERTAIN OTHER SECTIONS.

General speaking, this bill is designed to fill gaps in our present statutory indemnification provisions. See, e.g., the discussion by Professor Folk in 43 North Carolina Law Review at pp. 808-812 in which he points up some of the deficiencies of our present statutes. It is also appropriate to note the greatly increased interest on the part of corporate management and the bar in the subject of indemnification since the Texas Gulf Sulpher and the BarChris decisions of late last summer and fall. This interest was, in a sense, anticipated by the draftsmen of the amendments to the Delaware Act which were adopted in 1967. Since the two decisions referred to, a number of states have adopted amendments to their indemnification provisions--many by simply adopting the Delaware provisions in toto. Finally, it should be noted that some insurance companies have, within recent years, begun to offer Directors' and Officers' Liability Insurance. Many corporations in this state have expressed an interest in obtaining such insurance, and some corporations have already procured it.

In view of these factors, the time seems especially ripe for legislative action in this sensitive area. It is the unanimous view of the General Statutes Commission's Drafting Committee on the Business Corporation Act that, if possible, this legislation be adopted in this General Assembly. It is the view of the Committee that the delicate balance that a properly drawn indemnification statute requires is maintained in these provisions. Attention has been directed by the draftsmen to all the statutes passed within the last few years in this area. It is our belief that this bill incorporates the best features of them, while retaining the essential features of our prior legislation on the subject.

This memorandum will indicate, section by section, in what particulars our present provisions will be amended by this bill.

§55-19 (a). Substance is unchanged.

(b). Unchanged except for the addition of a definition of "person" so as to make it clear that the legal representative, e.g., of a deceased officer or director may succeed to the rights that person would have under these provisions.

(c) This section, which is based on the Delaware statute, is a provision entirely new to North Carolina. It simply authorizes a corporation to purchase the kind of insurance for its directors and officers that is now being made available by insurance companies. It is notable that California, upon whose indemnification provisions our original statutes were based, adopted a similar provision in December of last year.

(d) This sub-section is also entirely new to North Carolina and is also based on the Delaware provision and similar provisions found in many other states.

§55-20 (a) The language of this sub-section varies from our current law only in the broadening of the scope of persons and proceedings covered by the section. The substance is otherwise unchanged.

(a)(1) The only change made in this sub-section is to allow indemnification as a matter of right "if the proceeding is an administrative or investigative proceeding which does not result in the indictment, fine or penalty of such person."

(a)(2) Substance is unchanged.

(a)(3) There are two changes from present law in this sub-section: First, the scope of proceedings is broadened to cover administrative or investigative proceedings, and secondly, part of the old sub-section has been put into a new sub-sub-section.

(a)(3)(i) which is unchanged from the old sub-section (3) except for allowing consent by shareholders at a meeting (as presently provided) or by their unanimous written consent. (This change is in accord with the general provisions of §55-63 regarding informal action by shareholders.)

(a)(3)(ii) This is entirely new. It provides an alternative mode of determining whether the unsuccessful or partially

successful director or officer may be indemnified. The provision, based on that now found in a number of other states, permits (note that it does not require) the directors, if there is a quorum of disinterested directors, to vote indemnification upon their determination that the director or officer concerned "acted in good faith and in a manner he reasonably believed to be in the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful."

(a)(3)(iii) This is also entirely new to our statute and also provides an alternative mode of determining whether the unsuccessful or partially successful director or officer may be indemnified. The same power is given to a court that is given to the board in (a)(3)(ii). Note that if a quorum of the directors has been involved in litigation, they may be indemnified only by a shareholder vote or by the court.

§55-20(b). This provision is entirely new to our statute and is designed to negate any presumption of bad faith, etc. that might otherwise arise out of the disposition of the action against the director, officer, employee or agent. Such a provision is common to the more recently enacted statutes.

§55-21(a). Substance unchanged except to broaden the scope of persons who are covered by the statute.

(a)(1) This incorporates <u>in toto</u> the provisions of the former (a)(1) and (2). The substance remains unchanged.

(a)(2) This is an entirely new provision which authorizes a court to direct indemnification to the extent it considers reasonable, even if the director or officer was unsuccessful in the derivative action if the court finds that the person "has acted honestly and reasonably and that, in view of all the circumstances of the case, his conduct fairly and equitably merits such relief." The purpose of this provision is to permit indemnification, e.g., in the unusual situation of liability on a question of first impression. It is to provide for the hard (extremely close) case.

C-838
(1969)

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND THE MOTOR VEHICLES LAW WITH REGARD TO NOTATION OF SECURITY INTERESTS ON TITLES SO AS TO CONFORM TO THE UNIFORM COMMERCIAL CODE. GSC 226, SB 85 SUBSTITUTE.

The General Assembly of 1965 enacted the Uniform Commercial Code in North Carolina to take effect on June 30, 1967 (Session Laws 1965, Chapter 700). The Uniform Commercial Code preempted the field of substantive law with regard to perfection of security interests and priority of security interests in personal property. By express limitation in the original act as amended in 1967, the General Assembly chose to remove from the requirement of local filing of financing statements security interests in motor vehicles (G.S. 25-9-302(3) and (4)).

§ 25-9-302. When filing is required to perfect security interest; security interests to which filing provisions of this article do not apply. —(1) A financing statement must be filed to perfect all security interests except the following:

(a) a security interest in collateral in possession of the secured party under § 25-9-305;

(b) a security interest temporarily perfected in instruments or documents without delivery under § 25-9-304 or in proceeds for a ten-day period under § 25-9-306;

(c) a purchase money security interest in farm equipment having a purchase price not in excess of twenty-five hundred dollars ($2500.00); but filing is required for a fixture under § 25-9-313 or for a motor vehicle required to be licensed; however, compliance with G.S. 20-58 et seq. shall meet the filing requirements for such motor vehicles.

(d) a purchase money security interest in consumer goods; but filing is required for a fixture under § 25-9-313 or for a motor vehicle required to be licensed; however, compliance with G.S. 20-58 et seq. shall meet the filing requirements for such motor vehicles.

(e) an assignment of accounts or contract rights which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the outstanding accounts or contract rights of the assignor;

(f) a security interest of a collecting bank (§ 25-4-208) or arising under the article on sales (see § 25-9-113) or covered in subsection (3) of this section.

(2) If a secured party assigns a perfected security interest, no filing under this article is required in order to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(3) The filing provisions of this article do not apply to a security interest in property subject to a statute

(a) of the United States which provides for a national registration or filing of all security interests in such property; or

(b) of this State which provides for central filing of, or which requires indication on a certificate of title of, such security interests in such property.

(4) A security interest in property covered by a statute described in subsection (3) can be perfected only by registration or filing under that statute or by indication of the security interest on a certificate of title or a duplicate thereof by a public official.

Those sections state that perfection and requirements for filing of a security interest are governed by the act establishing central registration of titles. The specific sections which govern in the case of motor vehicle titles are G.S. 20-58 through 20-58.9.

The General Statutes Commission in an effort to clarify the law and to eliminate, where possible, areas of duplication and possible conflict between the terms of Chapter 20 and Chapter 25 chose to delete from G.S. 20-58 through 20-58.9 as much as possible of the substantive law. The substantive law was repealed through the General Repealer Clause contained in the original enactment of Uniform Commercial Code (1965, c.700,S.6). The Commission pursued this project over a period of eighteen months. Miss Foy Ingram, Director of the Registration Division of the Motor Vehicles Department, was consulted on numerous occasions. In February, 1969, the Commissioner of Motor Vehicles, the Honorable Joe Garrett, agreed to meet with Representatives of the General Statutes Commission, Assistant Attorneys General assigned to his department, and Miss Ingram to determine where, if at all, the Department of Motor Vehicles and the General Statutes Commission could agree on revision of the law.

The bill originally introduced, Senate Bill 85, introduced by Senators Allsbrook and Edwards, was reviewed by these conferees on a paragraph by paragraph and sentence by sentence basis in two lengthy afternoon sessions. A compromise bill was agreed upon incorporating certain minor changes from the original bill, some clarifying additional language and some deletions in information shown on the certificate of title.

By way of explanation of the bill before you, I have listed the proposed sections of the substitute bill with a note as to their source, the reason for altering the present statute and the rationale for the insertion of any new material.

Proposed 20-58(a) comes from G.S. 20-58(a).

Proposed 20-58(a)(1) comes from G.S. 20-58(b) and G.S. 20-58.1.

20-58(a)(2) comes from G.S. 20-58(b).

Proposed 20-58(a)(3) is new and provides that the secured party may request notation of security interest on a title. This addition is in keeping with the spirit of the Uniform Commercial Code which provides for a similar privilege on behalf of secured parties in certain other circumstances. (G.S. 25-9-402(2))

§ 25-9-402. **Formal requisites of financing statement; amendments.**—(1) A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned and the name of the record owner or record lessee thereof. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties.

(2) A financing statement which otherwise complies with subsection (1) is sufficient although it is signed only by the secured party when it is filed to perfect a security interest in

(a) collateral already subject to a security interest in another jurisdiction when it is brought into this State. Such a financing statement must state that the collateral was brought into this State under such circumstances.

(b) proceeds under § 25-9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral.

Proposed 20-58(b) comes from G.S. 20-58(b).

G.S. 20-58(c) was deleted. The controlling UCC provision is G.S. 25-9-103(3) and (4) which sets out similar rules.

§ 25-9-103. **Accounts, contract rights, general intangibles and equipment relating to another jurisdiction; and incoming goods already subject to a security interest.**—(1) If the office where the assignor of accounts or contract rights keeps his records concerning them is in this State, the validity and perfection of a security interest therein and the possibility and effect of proper filing is governed by this article; otherwise by the law (including the conflict of laws rules) of the jurisdiction where such office is located.

(2) If the chief place of business of a debtor is in this State, this article governs the validity and perfection of a security interest and the possibility and effect of proper filing with regard to general intangibles or with regard to goods of a type which are normally used in more than one jurisdiction (such as automotive equipment, rolling stock, airplanes, road building equipment, commercial harvesting equipment, construction machinery and the like) if such goods are classified as equipment or classified as inventory by reason of their being leased by the debtor to others. Otherwise, the law (including the conflict of laws rules) of the jurisdiction where such chief place of business is located shall govern. If the chief place of business is located in a jurisdiction which does not provide for perfection of the security interest by filing or recording in that jurisdiction, then the security interest may be perfected by filing in this State. For the purpose of determining the validity and perfection of a security interest in an airplane, the chief place of business of a debtor who is a foreign air carrier under the Federal Aviation Act of 1958, as amended, is the designated office of the agent upon whom service of process may be made on behalf of the debtor.

(3) If personal property other than that governed by subsections (1) and (2) is already subject to a security interest when it is brought into this State, the validity of the security interest in this State is to be determined by the law (including the conflict of laws rules) of the jurisdiction where the property was when the security interest attached. However, if the parties to the transaction understood at the time that the security interest attached that the property would be kept in this State and it was brought into this State within 30 days after the security interest attached for

§ 25-9-402. **Formal requisites of financing statement; amendments.**—(1) A financing statement is sufficient if it is signed by the debtor and the secured party, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral. A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown or goods which are or are to become fixtures, the statement must also contain a description of the real estate concerned and the name of the record owner or record lessee thereof. A copy of the security agreement is sufficient as a financing statement if it contains the above information and is signed by both parties.

(2) A financing statement which otherwise complies with subsection (1) is sufficient although it is signed only by the secured party when it is filed to perfect a security interest in

(a) collateral already subject to a security interest in another jurisdiction when it is brought into this State. Such a financing statement must state that the collateral was brought into this State under such circumstances.

(b) proceeds under § 25-9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original

Proposed 20-58.1(a) comes in large part from G.S. 20-58.1(4) while proposed 20-58.1(b) is found in large part in 20-58.1(3).

Proposed 20-58.2 comes from G.S. 20-58(b).

G.S. 20-58.2 was deleted. The controlling UCC provisions are G.S. 25-9-302(1)(c), (1)(d), (3) and (4).

Proposed 20-58.3 is found in G.S. 20-58.3(b).

G.S. 20-58.3(a) is deleted since G.S. 25-9-302(2) and 25-9-318 cover the substantive law involved.

§ **25-9-318. Defenses against assignee; modification of contract after notification of assignment; term prohibiting assignment ineffective; identification and proof of assignment.**—(1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in § 25-9-206 the rights of an assignee are subject to

(a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

(b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

(2) So far as the right to payment under an assigned contract right has not already become an account, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

(3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the account has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

(4) A term in any contract between an account debtor and an assignor which prohibits assignment of an account or contract right to which they are parties is ineffective. (1945, c. 196, s. 6; 1961, c. 574; 1965, c. 700, s. 1.)

G.S. 20-58.3(b) has been altered to remove the phrase setting out substantive rights covered by G.S. 25-9-302(2).

G.S. 20-58.3(c) is deleted. The substantive law is found at G.S. 25-9-302.

Proposed 20-58.4(a),(b),(c) and (d) represent in large part a reenactment of the present 20-58.4 with minor changes in language. A similar UCC provision is G.S. 25-9-406.

§ **25-9-406. Release of collateral; duties of filing officer; fees.**—A secured party of record may by his signed statement release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. Upon presentation of such a statement to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a statement of release shall be a minimum charge of two dollars ($2.00) for up to and including the first two pages and one dollar ($1.00) per page for all over two pages. (1965, c. 700, s. 1; 1967, c. 24, s. 25.)

Proposed 20-58.5 is a reenactment of G.S. 20-58.5.

G.S. 20-58.6 purports to establish a priority which is now covered by G.S. 25-9-301. It further provides for notice to the Department of Motor Vehicles of the levy which is not necessary since notice of sale is in the law elsewhere in Chapter 20. Consequently G.S. 20-58.6 is omitted.

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§ **25-9-301. Persons who take priority over unperfected security interests; "lien creditor."**—(1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of

(a) persons entitled to priority under § 25-9-312;

(b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected;

(c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;

(d) in the case of accounts, contract rights, and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase money security interest before or within ten days after the collateral comes into possession of the debtor, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment. Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest. (1945, c. 182, s. 4; c. 196, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1.)

G.S. 20-58.7 is renumbered as proposed 20-58.6 but is otherwise unchanged. Comparable requirements are imposed on other secured parties by G.S. 25-9-208.

G.S. 20-58.8 is renumbered but otherwise remains unchanged.

G.S. 20-58.9 is carried over as proposed 20-58.8 with clarifying language in (a) and modifications and deletions from (b)(3) to mesh with G.S. 25-1-201(9)&(37) and 25-9-307.

§ **25-1-201. General definitions.**—

(9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(37) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer (§ 25-2-401) is limited in effect to a reservation of a "security interest." The term also includes any interest of a buyer of accounts, chattel paper, or contract rights which is subject to article 9. The special property interest of a buyer of goods on identification of such goods to a contract for sale under § 25-2-401 is not a "security interest," but a buyer may also acquire a "security interest" by complying with article 9. Unless a lease or consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (§ 25-2-326). Whether a lease is intended as security is to be determined by the facts of each case; however, (a) the inclusion of an option to purchase does not of itself make the lease one intended for security, and (b) an agreement that upon compliance with the terms of the lease the lessee shall become or has the option to become the owner of the property for no additional consideration or for a nominal consideration does make the lease one intended for security.

§ 25-9-307. **Protection of buyers of goods.**—(1) A buyer in ordinary course of business (subsection (9) of § 25-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

(2) In the case of consumer goods and in the case of farm equipment having an original purchase price not in excess of twenty-five hundred dollars ($2500.00) (other than fixtures, see § 25-9-313), a buyer takes free of a security interest even though perfected if he buys without knowledge of the security interest, for value and for his own personal, family or household purposes or his own farming operations unless prior to the purchase the secured party has filed a financing statement covering such goods. (1945, c. 182, s. 4; 1955, c. 386, s. 2; 1961, c. 574; 1965, c. 700, s. 1.)

The substitute bill is a compromise product agreeable in its present form to the General Statutes Commission and to the Commissioner of Motor Vehicles, Honorable Joe Garrett. The bill accomplishes the principal aim of the General Statutes Commission - to remove substantive law provisions regarding priority of liens from the Motor Vehicles Act wherever the subject is adequately covered by the Uniform Commercial Code. The substitute bill concedes in several respects to the Department of Motor Vehicles' position in respect to administration of the title law and daily operation of motor vehicle registration.

§ 20-58. **Perfection of security interests generally.**—(a) Except as provided in G.S. 20-58.9, a security interest in a vehicle of a type for which a certificate of title is required is not valid against creditors of the owner or subsequent transferees or lien holders of the vehicle unless perfected as provided in this chapter.

(b) A security interest is perfected by delivery to the Department of the existing certificate of title if the vehicle has been previously registered in this State, and if not, an application for a certificate of title containing the name and address of the lien holder, the date, amount and nature of his security agreement, and the required fee. The lien is perfected as of the time of its creation if the delivery of the certificate or application to the Department is completed within ten days thereafter, otherwise it is perfected as of the time of delivery.

(c) If a vehicle is subject to a security interest when brought into this State, the validity of the security interest is determined by the law of the jurisdiction where the vehicle was when the security interest attached, subject to the following:

(1) If the vehicle is purchased for use and registration in North Carolina, the validity of the security interest in this State is determined by the law of this State.

(2) If the security interest was perfected under the law of the jurisdiction where the vehicle was when the security interest attached, the following rules apply:

a. If the name of the lien holder is shown on an existing certificate of title issued by that jurisdiction, his security interest continues perfected in this State.

b. If the name of the lien holder is not shown on an existing certificate of title issued by that jurisdiction, the security interest continues perfected in this State for four months after vehicle is brought into this State, and also, thereafter if, within the four-month period, it is perfected in this State. The security interest may also be perfected in this State after the

expiration of the four-month period; in that case perfection dates from the time of perfection in this State.

(3) If the security interest was not perfected under the law of the jurisdiction where the vehicle was when the security interest attached, it may be perfected in this State; in that case, perfection dates from the time of perfection in this State. (1937, c. 407, s. 22; 1955, c. 554, s. 2; 1961, c. 835, s. 6.)

§ 20-58.1. **Liens created subsequent to original issuance of certificate of title.**—If an owner creates a security interest in a vehicle after the original issuance of a certificate of title to such vehicle.

(1) The owner shall immediately execute an application, on a form the Department prescribes, to name the lien holder on the certificate, showing the name and address of the lien holder, the amount, date and nature of his security agreement, and cause the certificate, application and the required fee to be delivered to the lien holder.

(2) The lien holder shall immediately cause the certificate, application and the required fee to be mailed or delivered to the Department.

(3) If the certificate of title is in the possession of some prior lien holder, the new or subordinate lienor shall forward to the Department the required application for noting his lien, together with the required fee, and the Department when satisfied that the application is in order shall procure the certificate of title from the lien holder in whose possession it is being held, for the sole purpose of noting the new lien thereon. Upon request of the Department, a lien holder in possession of the certificate of title shall forthwith deliver or mail the certificate of title to the Department. The delivery of the certificate does not affect the rights of the first lien holder under his security agreement.

(4) Upon receipt of the certificate of title, application and the required fee, the Department, if it finds the application in order, shall either endorse on the certificate, or issue a new certificate containing, the name and address of the new lien holder, and mail the certificate to the first lien holder named in it. The Department shall also notify the new lien holder of the fact that his lien has been noted upon the certificate of title. (1961, c. 835, s. 6.)

§ 20-58.2. **Certificate as notice of lien.**—A certificate of title to a vehicle, when issued by the Department showing a lien or encumbrance, shall be deemed adequate notice to all creditors and purchasers that a security interest exists in and against the motor vehicle, and recordation of such reservation of title, lien or encumbrance in the county wherein the purchaser or debtor resides or elsewhere shall not be necessary for the validity thereof. (1961, c. 835, s. 6.)

§ 20-58.3. **Assignment by lien holder.**—(a) A lien holder, other than one whose interest is dependent solely upon possession may assign, absolutely or otherwise, his security interest in the vehicle to a person other than the owner without affecting the interest of the owner or the validity of the security interest, but any person without notice of the assignment is protected in dealing with the lien holder as the holder of the security interest and the lien holder remains liable for any obligations as lien holder until an assignment by the lien holder is delivered to the Department as provided in subsection (b).

(b) The assignee may, but need not to perfect the assignment, have the certificate of title endorsed or issued with the assignee named as lien holder, upon delivering to the Department with the required fee, the certificate of title and an assignment by the lien holder named in the certificate in the form the Department prescribes.

(c) The assignee of any lien properly assigned and noted on the certificate of title as described above shall be entitled to the same priority among the outstanding lienors and have all the other property rights therein as had formerly been held by his assignor. (1961, c. 835, s. 6.)

§ 20-58.4. **Release of security interest.**—(a) Upon the satisfaction of a security interest in a vehicle for which the certificate of title is in the possession of the lien holder, the lien holder shall within ten days after demand and, in any event, within thirty days, execute a release of his security interest, in the space provided therefor on the certificate or as the Department prescribes, and mail or deliver the certificate and release to the next lien holder named therein, or, if none, to the owner or other person authorized to receive the certificate for the owner.

(b) Upon the satisfaction of a security interest in a vehicle for which the certificate of title is in the possession of a prior lien holder, the lien holder whose security interest is satisfied shall within ten days execute a release of his security interest in such form as the Department prescribes and mail or deliver the same to the owner or other person authorized to receive the same for the owner.

(c) An owner, upon securing the release of any security interest in a vehicle shown upon the certificate of title issued therefor, may exhibit the documents evidencing such release, signed by the person or persons making such release, and the certificate of title to the Department which shall, when satisfied as to the genuineness and regularity of the release, issue to the owner either a new certificate of title in proper form or an endorsement or rider attached thereto showing the release of the security interest.

(d) If an owner exhibits documents evidencing the release of a security interest as provided in subsection (c) of this section but is unable to furnish the certificate of title to the Department because it is in possession of a prior lien holder, the Department, when satisfied as to the genuineness and regularity of the release, shall procure the certificate of title from the person in possession thereof for the sole purpose of noting thereon the release of the subsequent security interest, following which the Department shall return the certificate of title to the person from whom it was obtained and notify the owner that the release has been noted on the certificate of title.

(e) If it is impossible for the owner to secure from the lien holder the release contemplated by this section, the owner may exhibit to the Department such evidence as may be available showing satisfaction of the debt secured, together with a sworn affidavit by the owner that the debt has been satisfied, which the Department may treat as a proper release for purposes of this section when satisfied as to the genuineness, truth and sufficiency thereof. Prior to cancellation of a security interest under the provisions of this subsection, at least fifteen days' notice of the pendency thereof shall be given to the lien holder at his last known address by the Department by registered letter. (1961, c. 835, s. 6.)

§ 20-58.5. **Duration of security interests in favor of firms which cease to do business.**—Any security interest recorded in favor of a firm or corporation which, since the recording of such lien, has dissolved, ceased to do business, or gone out of business for any reason, and which remains of record as a security interest of such firm or corporation for a period of more than three years from the date of the recording thereof, shall become null and void and of no further force and effect. (1961, c. 835, s. 6.)

§ 20-58.6. **Levy of execution or other proper court order as constituting security interest, etc.**—A levy made by virtue of an execution or some other proper court order, upon a vehicle for which a certificate of title has been issued by the Department, shall constitute a security interest, subsequent to all others theretofore recorded by the Department, if and when the officer making such levy makes a report to the Department in the form prescribed by the Department, that such levy has been made and that the vehicle levied upon has been seized by and is in the custody of such officer. If such security interest created thereby is thereafter satisfied, or should the vehicle thus levied upon and seized be thereafter released by such officer, he shall immediately report that fact to the Department. Any owner who, after such levy and seizure by an officer and before a report thereof by the officer to the Department, shall fraudulently assign or transfer his title to or interest in such vehicle or cause the certificate of title thereto to be assigned or transferred or cause a security interest to be shown upon such certificate of title shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500.00), or imprisoned for not less than ten days nor more than twelve months. (1961, c. 835, s. 6.)

§ 20-58.7. **Duty of lien holder to disclose information.**—A lien holder named in a certificate of title shall, upon written request of the owner or of another lien holder named on the certificate, disclose information as to his security agreement and the indebtedness secured by it. (1961, c. 835, s. 6.)

§ 20-58.8. **Cancellation of certificate.**—The cancellation of a certificate of title shall not, in and of itself, affect the validity of a security interest noted on it. (1961, c. 835, s. 6.)

§ 20-58.9. **Excepted liens and security interests.**—The provisions of G.S. 20-58 through 20-58.8 inclusive shall not apply to or affect:

(1) A lien given by statute or rule of law for storage of a motor vehicle or to a supplier of services or materials for a vehicle;

(2) A lien arising by virtue of a statute in favor of the United States, this State or any political subdivision of this State; or

(3) A security interest in a vehicle created by a manufacturer or dealer who holds the vehicle for resale but a buyer in the ordinary course of trade from the manufacturer or dealer takes free of such security interest. (1961, c. 835, s. 6.)

C-895
(1969)
GSC 86

MEMORANDUM

A BILL TO BE ENTITLED AN ACT TO AMEND THE RULES OF CIVIL PROCEDURE AND CERTAIN OTHER STATUTES RELATING TO CIVIL PROCEDURE.
(SB 651, HB 820)

The General Statutes Commission has carefully studied the Rules of Civil Procedure since their enactment in 1967. The Civil Procedure Drafting Committee who drafted the Rules has met and discussed at length technical problems and drafting oversights which have come to their attention in the course of the several Bar Association Institutes and other discussions of the new Rules.

The amendments contained in this bill are for the most part the Committee's effort to remove "bugs" from the Rules and related statutes to assure a smooth transition from our civil procedure under previous statutes to practice under the new Rules of Civil Procedure.

The primary exception to this is the proposed amendment to Rule 41(a)(1) relating to voluntary dismissal by plaintiff as a matter of right. The General Statutes Commission met with legislator-members of the Legislative Study Commission on the Rules of Civil Procedure, chaired by Senator Julian Allsbrook. Out of those meetings was produced a compromise amendment on the voluntary dismissal issue. The gist of the compromise is that a plaintiff may as a matter of right on a one-time basis voluntarily dismiss his own suit (take a voluntary nonsuit) at any time before the jury is empaneled. While not the first choice of any group or legislator represented in our discussions, the compromise seems acceptable. The amended language is found in section 10 of the bill at page 12 on lines 15-17.

The remaining amendments are discussed in the order in which they appear in the bill and will be referred to by bill section number, Rule number and General Statutes section number where applicable.

Section 1, G.S. 1A-1, Rule 4(a).

The amendment adds to the persons eligible to serve process outside the State "anyone who is not a party and is not less than 21 years of age".(p 1, line 15)The purpose of this amendment to Rule 4(a) and the succeeding amendments to Rule 4 is to expand and make more flexible the various procedures for service of process outside the State.

Section 2, G.S. 1A-1, Rule 4(j)(1) and (2).
Section 3, G.S. 1A-1, Rule 4(j)(6), (7) and (8).
Section 4, G.S. 1A-1, Rule 4(j)(9).

The amendments to Rule 4(j)(1) and (2) change treatment of minors over 14 and remove the exemption from disability previously established for minors over 14 years of age.

The rationale for the proposed amendments to Rule 4(j)(6)(7) and (8) and the addition of a new Rule 4(j)(9) is set out by the Committee as follows:

> In response to requests from attorneys for the reenactment of the non-resident motor vehicle act, the Drafting Committee has reexamined the provisions of Rule 4, which provides the method of service of process on persons subject to the personal jurisdiction of North Carolina courts. It is now our opinion that section (j) of Rule 4, which was largely copied from a Wisconsin statute, imposes costly methods of serving process on non-residents that greatly exceed the requirements of presently existing statutes, such as the non-resident motor vehicles act, and of the due process clause of the Fourteenth Amendment to the Constitution of the United States. Thus, to serve a non-resident who has committed a tort in North Carolina, it is presently necessary under Rule 4 (j) to hire a foreign process server, who must make diligent efforts to serve the defendant personally before process may be left at the defendant's abode with a person of suitable age and discretion residing therein. If service cannot be effected in this way with due diligence, then the costly and drawn out process of service by publi-

cation and mailing must be used. Reenactment of the non-resident motor vehicle statute would of course obviate the necessity of employing these methods in such cases. In all other cases, however, of torts or other activity in North Carolina that subjects a defendant to the personal jurisdiction of our courts, the more elaborate requirements of Rule 4 (j) would, for no rational reason, have to be employed. Accordingly the Drafting Committee has rewritten Rule 4 (j) to give residents of North Carolina the simplest and least expensive method permitted by the Constitution of serving process on non-resident defendants.

First, we have provided that a process server making personal service on any natural person within or without this State may, on his first attempt, leave process with any person of suitable age and discretion residing in the defendant's abode. Such a provision is now found in Rule 4 (d) (1) of the Federal Rules of Civil Procedure, as well as in the similar rules of many states, and there is absolutely no question of its validity. Jackson v. Heiser, 111 F. 2d 310 (9th Cir. 1940); 2 Moore's Federal Practice ¶4.11 [2]. Rule 4 (j) now provides for service in this manner upon corporations, partnerships and unincorporated associations.

Secondly, to serve any defendant not resident of or found within this state, Proposed Rule 4 (j) (9) will allow either personal service outside the state or service by registered mail, return receipt requested. The rule lists a class of defendants that may be served in this manner immediately, such as non-resident individuals or unregistered foreign corporations, and also contains an alternative catchall for defendants that cannot otherwise be served. The alternatives should provide a sufficiently clear test in most cases to avoid litigation and the possibility of improper service.

There is no question that such service, if effected upon such persons, is constitutional. McGee v. International Life Insurance Co., 355 U.S. 220 (1957); Traveler's Health Ass'n v. Virginia, 339 U.S. 643, 650-51 (1950); International Shoe Co. v. State of Washington, 326 U.S. 310, 320 (1945); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 2d 673 (1957). These cases also make it clear that service by registered mail does not require for its constitutionality service upon an official of the state, such as the Commissioner of Motor Vehicles or the Secretary of State,

who is by statute designated an agent authorized to be served or to accept service of process. See 2 Moore's Federal Practice ¶¶4.41-1 [2], 4.41-1 [3] (2d Ed. 1967). It is the service of process in a manner reasonable calculated to give actual notice that satisfies the Constitution. That is why such statutes are unconstitutional if they do not require the state official to forward the process immediately to the defendant. Wuchter v. Pizzutti, 276 U.S. 13 (1928). The act of serving the fictitious agent adds nothing to such service. In fact the non-resident motor vehicle statute now provides that service is deemed completed on the date the papers are delivered by registered mail to the defendant, as shown on the return receipt, G.S. 1-105, suggesting that service is not valid under the statute, without regard to any parallel constitutional requirement, until defendant has actually received the letter.

To prevent false practices by the party making such service and to assist him in resisting collateral attacks upon a judgment based upon such service, the rule provides that before a default judgment based upon such service may be obtained, the party making service must file an affidavit of service including whatever is required for proof of service of process. Furthermore, the affidavit will be prima facie evidence after judgment that service was properly effected. Service by registered mail is not effected unless the letter is actually delivered to the defendant. Ordinarily proof of delivery is the signed returned receipt. Any other evidence of actual delivery is also acceptable. See Aero Associates, Inc. v. La Metropolitana, 183 F. Supp. 357 (SDNY 1960). If the envelope is returned stamped "delivery refused," "letter unclaimed," "addressee unknown at the address" or "addressee moved" and left no forwarding address," service has not been effected.

Whenever plaintiff has attempted and failed to make service by either personal service outside the state or by registered mail, he may try the other method or resort immediately to service by publication and mailing. Thus, if the attempt to serve personally or by registered mail discloses that the defendant is unknown or no longer found at the known address, it is obviously futile to try the other method, unless it is preceded by an investigation to locate the defendant's actual residence or whereabouts. On the other hand, if the address is apparently correct, the cautious attorney may chose to attempt service by the other method or try again with the first method before resorting to publication and mailing, even though service at this time by publication and mailing to

a correct address should satisfy the Constitution. The difficult problem is what to do when defendant's residence or whereabouts is unknown or plaintiff learns, after an attempt at service, that his information is incorrect or no longer correct. It is not at all clear whether service in this situation by publication without mailing or mailing to a last known address known to be incorrect at time of mailing will effect valid personal service, see Note, 34 Mich. L. Rev. 1227 (1936), as distinguished from service in an action in rem or quasi in rem, where such service is also permitted and would more probably be valid. Cf Walker v. Hutchinson, 332 U.S. 112 (1956) (publication without mailing in condemnation action invalid where defendant's address was ascertainable); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1952). In such situations the attorney is operating at the fringes of the Constitution, where neither unambiguous precedent nor clearly valid methods of service are available and prudence may therefore dictate an attempt to locate the defendant and serve him thereafter in a manner not open to question.

Paragraph d of Rule 4 (j) (9) provides alternative methods when service is made in a foreign country. These provisions are based upon Rule 4 (i) of the Federal Rules of Civil Procedure and Rule 4 (e) (6) of the Arizona Rules of Civil Procedure, both of which are drawn from §2.01 of the Uniform Interstate and International Procedure Act. In essence these provisions enlist the assistance of a foreign government and its law in making service on a defendant found within its territory in order to ensure validity and to avoid any objection by the foreign government that efforts to make service constitute an encroachment on its sovereignty.

Finally paragraph e of Rule 4 (j)(9) provides that a defendant may not attack a judgment by default obtained pursuant to some form of substituted service on the ground that service within the state was possible. Thus a defendant served by registered mail cannot complain, except by appearing in the action prior to the entry of default judgment, that such service was, under the statute, invalid because defendant had an agent authorized to accept service within the state. The theory is that a defendant who has received one form of constitutionally valid notice of the pendency of an action against him cannot complain, after the entry of judgment by default, that he was not given some other form of notice, even though required by statute.

It is assumed that the full faith and credit clause of the Constitution of the United States will require other states to honor this provision in ruling upon collateral attacks upon default judgments entered in North Carolina.

Section 5. G.S. 1A-1, Rule 17(a).

The amendment adds a new last sentence to section (a). (p10,line 22). The sentence added comes from the 1966 Amendments to the Federal Rules. This addition is considered necessary and is in keeping with the Drafting Committee's policy of confining itself primarily to the removal of "bugs" and clarification of ambiguities in the Rules as passed by the General Assembly in 1967.

Section 6. G.S. 1A-1, Rule 17(b).

The rule stated in this amendment is now codified in the General Statutes as G.S. 1-65.5 (enacted by Ch.939, S.L. 1967, as G.S. 1-65.1). This amendment to Rule 17 (b) carries the present law forward into the Rules of Civil Procedure. G.S. 1-65.5 is repealed by Section 19 of this bill (p.18,line 14).

Section 7. G.S. 1A-1, Rule 18(a).

Rule 18(a) as originally approved

"(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20 and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 are satisfied."

was taken from the Federal Rules prior to 1966. The proposed amendment set out above is the same language of the 1966 amendment to Federal Rule 18(a) which was designed to avoid the effect of the decision in Federal Housing Administration v. Christianson, 26 F. Supp. 419 (D. Conn. 1939) where the court held that in a suit where plaintiff indorsee of two notes sued three co-makers of one note and sought to join in the action a second note made by two of the three defendants, joinder of the count on the second note was refused on the ground that the right to relief on the second note was common only to two of the three defendants. See USCA, Rule 18(a), 2 Barron and Holtzoff, Federal Practice to Procedure §533.1 (Wright ed 1961); 3 Moore's Federal Practice, para. 18.04[3] (2nd Edition 1963).

Section 8. G.S. 1A-1, Rule 34.

The amendment will eliminate from the rule that portion relating to discovery and production of documents, etc. without the necessity for obtaining a court order or showing good cause. The section deleted is unclear and was probably retained in Chapter 954 of the 1967 Session Laws through inadvertance.

Section 9. G.S. 1A-1, Rule 40.

The amendment adds a provision for continuances for good cause shown to the court.

The Rules do not presently provide for continuances, and some provision is necessary. Rule 15(b) permits continuance to enable a party to meet an amendment; Rule 56(f) permits continuance to procure opposing affidavits, and Rule 6(b) deals with certain time extensions. None of these purport to deal with the ordinary continuance of a trial.

Section 10. G.S. 1A-1, Rule 41.

The amendment relating to the one-time voluntary dismissal by the plaintiff (p 12, lines 15-18) is a compromise, not favored by the commission as the best approach but agreed to as a better solution than a voluntary dismissal by plaintiff as a matter of right being permitted at later stages of the trial.

The remaining proposed amendments to Rule 41 are primarily technical clarifications in two areas. First, the draftsmanship of the language incorporating North Carolina General Statutes §1-25 into Rule 41 has been improved. Secondly the scope of Section 41(b) has been clarified.

G. S. 1-25 provides in essence that if an action commenced before the statute of limitations has run is subsequently non-suited, a new action based on the same cause of action may be commenced within a year. For obvious reasons it was decided to repeal G. S. 1-25 and incorporate its substance into Rule 41, which governs all dismissals under the rules. This was done, with necessary changes in nomenclature, in the last sentence of subsections 41(a)(1) and 41(a)(2) and Section 41(b). These three sentences fail to specify, however, as G. S. 1-25 does, that the saving provision will take effect only if the original action was timely. This has been corrected in the proposed amendments by stating in each of the three sentences, in the exact language of G. S. 1-25, that the original action must be "commenced within the time prescribed therefor." Secondly it has been made clear in the proposed amendments that this saving provision applies to

a voluntary dismissal pursuant to a stipulation signed by all parties under subsection 41(a)(1)(ii), a result that the present language of the subsection seems to preclude. The purpose of permitting a voluntary dismissal by stipulation, which covers the same situations as, and otherwise has the same effect as, a dismissal by order of the judge under subsection 41(a)(2), is to avoid unnecessary hearings before the court when all the parties agreed to the dismissal. If the saving provision did not apply to voluntary dismissals by stipulation, the parties would be compelled to bother the judge with an unnecessary hearing whenever the statute of limitations was a problem. To avoid this wasteful procedure, the proposed amendment applies the saving provision to dismissals by stipulation in the same way it is applied to dismissals by order of the judge. The rights of the parties are not affected by the change because a notice of stipulation requires unanimity of opinion among the parties. If any party objects to the extension of the statute of limitations, he may refuse to sign the stipulation and thereby compel the plaintiff to seek the court's permission under subsection 41(a)(2).

Section 41(b) has three principal functions. First, it authorizes the involuntary dismissal of an action for any reason not specifically covered elsewhere in the rules. Secondly, it deals specifically with the involuntary dismissal of an action, ordinarily for insufficiency of evidence, after plaintiff has rested his case. Finally it governs the effect of all involuntary dismissals under the rules. It has been necessary to clarify the second and third functions.

With respect to the second function, Section 41(b) employs the same language as the pre-1963 version of Section 41(b) of the Federal Rules of Civil Procedure. This language caused confusion in the federal courts in jury trial cases because a motion for a directed verdict under Rule 50 could also be made at the close of plaintiff's evidence and, unlike the practice under the common law and the code, a dismissal pursuant to either motion ordinarily operated as an adjudication on the merits. Thus it was unclear whether a motion for directed verdict was the correct motion or either motion was correct. Additional confusion was caused by the requirement in Section 41(b) that the grant of a motion under that section required, unlike Rule 50, findings as provided in Rule 52(a). The basis of this distinction is the fact that in a non-jury case the court is also the finder of fact and consequently may decide to dismiss after weighing the plaintiff's evidence, a function it cannot perform in deciding whether to grant a directed verdict in a jury trial at the close of plaintiff's case. For all these reasons the Federal Rules of Civil Procedure were amended in 1963 to make it clear that a motion for involuntary dismissal under Rule 41(b) is available at the close of plaintiff's case only in an action tried by the court without a jury. It is the opinion of this committee that this is a desirable clarification and it has accordingly been incorporated into the proposed amendments. Again this involves no change of substance since the effects of granting either motion are substantially the same.

The final purpose of Rule 41(b) is to govern the effect of all involuntary dismissals under the rules. The rules now provide, as do the Federal Rules of Civil Procedure, that such dismissals, whether occasioned by the grant of a motion to dismiss for failure to state a claim for relief under Rule 12(b)(6), a motion to dismiss under Rule 37(b)(2)(iii) for failure to comply with a discovery order, a motion for involuntary dismissal under Rule 41(b), a motion for directed verdict under Rule 50, and a motion for a summary judgment under Rule 56, operate as an adjudication upon the merits and accordingly bar absolutely the reassertion of the claim or claims dismissed in any new action. This is a considerable departure from previous North Carolina practice and is based upon the proposition that a person, in an era of crowded courts and increasingly complicated litigation, is ordinarily entitled only to one hearing on the merits of his claim. The handmaiden of this proposition is the liberal provision in the Rules for discovery, the correction of mistakes, etc., in order to insure as much as possible that the dispositive hearing is in fact upon the merits and fair and complete. See generally, Louis, The Sufficiency of a Complaint, Res Judicata and the Statute of Limitations, 45 N. C. L. Rev. 659 (1967).

Nevertheless, there may be occasions when a party whose action is about to be dismissed can establish to the satisfaction of the court that it is fair and just that he be given another chance. For this reason Rule 41(b) of the Federal Rules of Civil Procedure provides that the court may specify in its order that any such dismissal is without prejudice. Rule 41(b) of the North Carolina Rules was intended to give this same desirable power to the court. Because of the language used in the present version of the rule, however, it can be argued that the court has this power only when the dismissal is technically an involuntary dismissal under Rule 41(b). Accordingly the proposed amendments now make it clear that this power extends to all dismissals other than voluntary dismissals under Rule 41(a).

Section 11. G.S. 1A-1, Rule 50(b).

The amendment deletes the last two sentences of Rule 50(b), renumbers Rule 50(b) as 50(b)(1), adds a new sentence at the end thereof and adds a new-subsection 50(b)(2). As to the deletion, it does not make sense to say in the first sentence that there shall be no review unless there is a post-verdict motion for judgment and then to say in the next sentence that there may be review if there is a motion for a new trial.

As to what we have added, it simply makes clear what we have been trying to achieve when a verdict loser does not follow the practice we have outlined for him in Rule 50(b). He should make a post-verdict motion for judgment. This enables the trial judge to consider whether or not, if he thinks the motion should be granted, the plaintiff should be allowed to come again. If the trial judge is short circuited on this, then it has been our thought all along that the appellate court should be limited to granting only a new trial.

Section 12. G.S. 1A-1, Rule 52.

Two technical clarifications and one addition have been made to this rule. Existing North Carolina case law, cited in the Comment to Rule 52, provides that a trial judge shall, at the request of a party, prepare written findings and conclusions justifying his ruling on a motion. This decision was incorporated into the text of Rule 52 by negative implication. The proposed amendment now states it positively. For stylistic reasons the subsequent sentence governing injunctions has been similarly recast, and the phrase "temporary injunction" has been changed to "preliminary injunction" so as to mesh this rule with the new terminology of Rule 65. Finally we have added a final sentence into the rule authorizing the trial judge, at his option, to file an opinion instead of formal findings of fact and conclusions of law. There are two reasons for proffering this option. First, the disposition of a motion often involves the application of basically undisputed facts to some general legal standard. What is usually sought in such a situation is a statement of reasons, for such a purpose a written opinion is a much more convenient

mode of expression. Second, there is a tendency among some trial judges to accept uncritically findings of fact proposed by the prevailing party. To the extent the court chooses to file an opinion instead, the necessities of the situation may reduce this undesirable tendency.

The Committee believes that Rule 52, as amended, would incorporate the substance of a bill dealing with the exercise and review of judicial discretion introduced by Senator White of Lenoir County in the 1967 General Assembly and subsequently referred to the General Statutes Commission for consideration. That bill in essence restated the legal principles governing the exercise and review of judicial discretion and provided that a trial judge, in exercising his discretion, should, upon the motion of a party, make findings of fact and give a statement of reasons for the decision reached. Since a trial judge almost always exercises his discretion in response to a motion by a party, the Committee feels that Rule 52, as amended, will sufficiently enable a party to obtain findings and conclusions in such a situation.

Section 13. G.S. 1A-1, Rule 53(a)(1).

Rule 53(a)(1) as presently written makes reference to "actions for divorce and separation" which has been modified by the recent changes to Chapter 50 of the General Statutes. Proper terminology would be "actions for divorce".

Section 14. G.S. 1-75.10(1)(b).

The amendments provide for reference in the affidavit of proof of service to the qualifications of the process server under the amended Rule 4(a) or 4(j)(9)(d) and permits proof of out of state service by meeting the foreign jurisdiction's standards.

Section 15. G.S. 1-271.

The amendment adds a sentence providing including in the definition of "party aggrieved" any party who cross assigns error in the disposition of a motion.

Rule 50 provides that a trial judge who has granted a motion for judgment not withstanding the verdict must also rule conditionally on the moving party's alternative motion for new trial and thereafter on any motion for new trial filed by the adverse party deprived of his verdict. Anticipating the various combinations of rulings that may result from these requirements, Rules 50(c) and 50(d) provide that an appellee may cross assign error in these rulings. For example, if the motion for judgment n.o.v. is granted, the alternative motion for new trial is conditionally denied, and the verdict winner's motion for new trial is denied, the verdict winner may appeal the erroneous denial of

his motion for new trial and the erroneous grant of the motion for judgment n.o.v. In this situation Rule 50(c) provides that the appellee may cross assign error in the conditional denial of his alternative motion for new trial to protect himself if the appellate court finds the grant of his motion for judgment n.o.v. erroneous.

G.S. 1-271, as presently interpreted, apparently forbids any such cross assignment of error by the party who ultimately prevailed in the trial court. Teague v. Duke Power Company, 258 N.C. 759, 129 S.E. 2d 507 (1963); McCullock v. R.R., 146 N.C. 316, 59 S.E. 882 (1907); see Bethea v. Town of Kenly, 261 N.C. 730, 136 S.E. 2d 38 (1964). In the opinion of the Committee, Rules 50(c) and 50(d) effect a pro tanto repeal of G.S. 1-271. Unfortunately Rules 50(c) and 50(d) enact the identical provisions of their Federal Rules counterparts, which specifically provide for cross assignments of error only when an appeal is authorized in the federal courts.

In the federal courts there is no provision authorizing, as N.C. G.S. 1-277 specifically does, an interlocutory appeal from an order granting a new trial. Thus, Rules 50(c) and 50(d) make no provision for cross assignments of error in such cases.

The Committee believes that a uniform rule is desirable here and accordingly that such cross assignments of error should be permitted in all such appeals. Furthermore, the reason for permitting such cross assignments, the desire to allow the disposition of all questions in a single appeal, goes beyond the immediate concerns of Rules 50(c) and 50(d). Thus, if a defendant whose motion for directed verdict has been denied obtains a jury verdict, he should also be permitted to cross assign error in the denial of this motion if the plaintiff appeals seeking a new trial. The same argument would apply if the defendant had moved to dismiss or for judgment on the pleadings under Rule 12 or for summary judgment under Rule 56. Thus, we have broadened the exception in G.S. 1-271 to include the cross assignment of error in the grant or denial of any motion under the Rules of Civil Procedure.

Section 16. G.S. 50-13.3(b).

The section here amended makes the remedy of injunction available in connection with actions for the custody of minor children, "as provided in Article 37 of Chapter 1 of the General Statutes." A part of Article 37 of Chapter 1 has been replaced by Rule 65, and accordingly a reference to Rule 65 is inserted by this amendment.

Section 17. G.S. 50-13.4(f).

G.S. 50-13.4(f)(2) provides that G.S. 1-227 and G.S. 1-228, relating to judgments transferring property, are applicable to judgments for child support. Under the new Rules, G.S. 1-227 is repealed and replaced by Rule 70.

G.S. 50-13.4(f)(5) makes the remedy of injunction, "as provided in Article 37 of Chapter 1 of the General Statutes" available in actions for child support. A part of Article 37 of Chapter 1 has been replaced by Rule 65, and accordingly a reference to Rule 65 is inserted by this amendment.

Section 18. G.S. 50-16.7.

G.S. 50-16.7(c) provides that G.S. 1-227 and G.S. 1-228, relating to judgments transferring property, are applicable to judgments for alimony. Under the new Rules, G.S. 1-227 is repealed and replaced by Rule 70.

G.S. 50-16.7(f) makes the remedy of injunction, "as provided in Article 37 of Chapter 1 of the General Statutes" available in actions for alimony. A part of Article 37 of Chapter 1 has been replaced by Rule 65, and accordingly a reference to Rule 65 is inserted by this amendment.

Section 19. G.S. 1-65.5.

Article 3 of Chapter 1B

G.S. 1-65.5 (1967 Cum. Supp, 1953 Recompiled Vol. 1A) was originally enacted as G.S. 1-65.1 (1967,c.937) but has since been

recodified. The purposes of the section are now covered in the proposed amendment to Rule 17(b) set out in Section 6 of this bill.

Chapter 1B of the General Statutes, enacted by Chapter 847, Session Laws of 1967, is the new chapter on contribution. Article 3 contains procedural provisions included as a temporary measure until the effective date of the new Rules. The Rules supersede Article 3 in its entirety.

Section 20. General repeal clause.

Section 21. This clause attempts to state as clearly as possible that the amendments to the Rules and related statutes contained in this act are intended to be given precisely the same effect as if they had been contained in and enacted as part of Chapter 954, 1967 Session Laws.

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MEMORANDUM

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND CHAPTER 55A OF THE GENERAL STATUTES RELATING TO NON-PROFIT CORPORATIONS.

This Bill is correlative to the Bill proposing amendments to Chapter 55. With one exception (Section 9), the amendments here proposed are designed simply to make the Non-Profit Corporation act conform to the amendments proposed to the Business Corporation Act. The two bills should, therefore, be considered together. The Bill and this commentary are the products of the Drafting Committee of the General Statutes Commission appointed to prepare amendments to the corporation laws. These amendments have been approved by the General Statutes Commission. The commentary is keyed to the text of the bill on a section by section basis. Appropriate cross references by section are made to the bill proposing amendments to Chapter 55.

Section 1 (G.S. 55A-6)
This amendment corresponds to the amendment proposed to G.S. 55-6 (set forth in Section 1 of that bill). It will permit one incorporator to sign and file Articles of Incorporation, eliminating the older requirement of multiple incorporators. The Committee feels the non-profit corporation act should conform to the business corporation act in this particular.

Section 2 (G.S. 55A-9)
This amendment corresponds to the amendment proposed to G.S. 55-11 (set forth in Section 3 of that bill). It is designed to remove any doubt about whether a corporation may complete its organization by informal action without an actual meeting of the directors. Under this amendment, it is made clear that such informal action will suffice in lieu of a meeting.

Section 3 (G.S. 55A-10)
This amendment corresponds to the amendments proposed to G.S. 55-12 (set forth in Sections 4, 5 and 6 of that bill). It is designed to make uniform the law relating to reservation and registration of corporate names, whether the names be those of profit or non-profit corporations. The same requirements and safeguards as are contained in the corresponding section of the Business Corporation Act are proposed here.

Section 4 (G.S 55A-15(b)(5)
This amendment corresponds in part to the amendment proposed to G.S. 55-17(b)(4) (set forth in Section 8 of that bill). It will permit a non-profit corporation to procure disability insurance for its benefit on any employee or officer whose disability might cause financial loss to the corporation.

Section 5 (G.S. 55A-23)
This amendment corresponds to the amendment proposed to G.S. 55-31 (as set forth in Section 13 of that bill). This amendment is designed (1) to eliminate the requirement that the charter or bylaws affirmatively authorize the designation of committees; (2) to define more clearly the matters on which the committees shall not have authority to act; and (3) to define

more clearly the procedures by which a committee or any member thereof may be discharged or removed.

Section 6 (G.S. 55A-27.1)

This amendment is identical to that proposed as the new G.S. 55-37.1 (set forth in section 14 of that bill). It is a verbatim adoption of Section 224 of the new Delaware General Corporation Law and is designed to validate the use by corporations of the many modern forms of information storage and retrieval devices.

Section 7. (G.S. 55A-60(b))

This amendment corresponds to the amendment proposed to G.S. 55-137(c) (set forth in section 40 of that bill). It is designed to provide a remedy for the problem raised when the name of a foreign corporation wishing to conduct affairs in this state is already in use. The solution suggested is identical to that proposed in the business corporation context and makes uniform the treatment of the corporate name problem whether the corporation be profit or non-profit.

Section 8 (G.S. 55A-61(a))

This amendment corresponds to the amendment proposed to G.S. 55-138 (set forth in section 41 of that bill). The only new matter involved in this amendment is contained in sub-section (a)(2). It simply requires a foreign corporation which is going to use a name different from its own as authorized in G.S. 55A-60 to so state in its application for a certificate of authority to conduct affairs in the state.

Section 9(G.S. 55A-86)

This amendment proposes three changes to 55A-86: (1) As in the proposed amendment to G.S. 55-63(c)(set forth in section 33 of that bill), it makes it clear that a written consent by shareholders, directors etc. may be signed and filed either before or after the action so taken; (2) it requires that such a written consent be filed with the secretary of the corporation; and (3) it clarifies the section by removing an anomaly created in 1963 by an amendment which provided that such a written consent could be by a majority of members (as compared to all of the members as the section originally provided). The anomaly thus created was in the form of 55A-86(b) which provided that "such consent (a majority as amended in 1963) shall have the same force and effect as a unanimous vote." The Committee considers it undesirable to provide by law that a majority vote has the effect of a unanimous vote. Therefore, this amendment repeals the old sub-section (b).

M E M O R A N D U M

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND THE LAWS RELATING TO MECHANICS' AND MATERIALMEN'S LIENS (GSC 23) SB.

In support of this bill, the General Statutes Commission and its drafting committee on lien laws submits the following memorandum and discussion:

1. Summary of Present Law. G. S. 44-1 presently describes the lien of the person dealing directly with the owner for the improvement of real property in terms of every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, etc. shall be subject to a lien for the payment of all debts contracted for work done on the same or materials furnished. A lien against real property must be filed in the Office of the Clerk of Superior Court in the county in which the property lies (G.S. 44-38) within 6 months after the completion of the labor or the final furnishing of the materials (G.S. 44-39). An action to enforce the lien created must be commenced in the Superior Court within 6 months from the date of filing of notice of the lien with the Clerk (G.S. 44-43). A doctrine of relation back has developed through case law that is summarized in Equitable Life Assurance Society vs. Basnight, 234 N.C. 347, 67 S.E. 2d 390 (1951). Doctrine of relation back results in the lien of the laborer or materialmen who deals directly with the owner relating back to the date of the first furnishing of labor or materials--as to other encumbrancers of record. As between the laborers and materialmen working with the same owner for improvement to the same piece of real estate, they share in accordance with the time their notice of lien is filed with the Clerk (G.S. 44-40).

2. Problems Under Present Law. The greatest single problem under the present law appears to be the requirement for particularity in the filing of the lien notice with the Clerk of Superior Court. This problem is particularly accented by the recent case of Mebane Lumber Company vs. Avery and Bullock Builders, Inc., 270 N.C. 337, 154 S.E.2d 665 (1967). G.S. 44-38 presently requires that all claims shall be filed in detail, "specifying the materials furnished or labor performed, and the time thereof." The language in 44-38 is rather archaic and stilted and appears to impose a rather harsh requirement especially in the case where a

material supplier has sold components for a prefabricated house as was the situation in Mebane Lumber Company vs. Avery and Bullock Builders, Inc. It is to be noted that the requirements for determining the priority of the lien do not have much to do with the description in detail of material furnished. The necessary elements for determining the priority of the lien consists only of the description of the property, the date which the first work was done and the amount of the claim together with the name of the person who owned the property at the time the work was done. From this information one can readily determine the asserted priority of the lien. The Courts have held that a defect in the notice of lien cannot be cured in the complaint that is subsequently filed. There is also some question as to whether or not it is necessary to file a notice of lis pendens at the time when action is instituted to enforce a lien under 44-1. The lis pendens statute by its terms, appears to require filing of a notice of lis pendens if the benefit of constructive notice is sought.

Another feature of the present law that is thought to be defective is the time period required to determine from the public records whether or not a lien of a laborer or materialmen is going to be asserted against a particular piece of real estate. Presently, such persons could wait for a period of time up to one year (six months to file a notice and six months thereafter within which to institute suit).

The courts seem to have had little difficulty in dealing with the question of the description of the real estate where the work was done and the subject of necessary and proper parties to an action to enforce the lien. The only necessary parties in the action to enforce the lien are the lien claimant and the owner. If the benefit of factual determinations in the lien foreclosure action is sought, subsequent encumbrances and other lien claimants are proper parties.

There are several other problems of relatively minor signaficance concerning the present statutory language. There are no formal definitions for the operative language of the lien. Apparently only a "building" can give rise to a lien for labor and materials on the land, but apparently the word has received rather broad interpretation so as to apply to anything that is "real property." See, for example, McNeil Pipe and Foundry Company vs. Howland and Durham Water Company, 111 N.C. 615, 16 S.E. 857 (1892). The lien of the laborer comes ahead of the homestead exemption by virtue of the Constitution, but the lien of a material furnisher does not.

There is no way to tell from mere examination of public records as to whether or not a lien is claimed on a particular piece of property and one must wait 6 months from the last doing of any work or furnishing of any materials in order to ascertain whether or not the lien rights have expired.

An additional problem that exist in the present law is that of lien circuity. The problem can easily be illustrated: A furnishes labor and materials to the property on Monday, B records the mortgage against the property on Tuesday, C furnishes labor and materials on Wednesday. C files notice and claim of lien on Thursday and A files notice and claim of lien on Friday. Suits are instituted in the statutory time and all parties are before the court. A's lien is prior to B's mortgage. B's mortgage is ahead of C's lien. C's lien, however, is ahead of A's lien because C filed before A did. The North Carolina Court has never adequately dealt with the question of "who gets what" in this situation.

3. Changes in Present Law Effected by Article 2 of Chapter 44A.

Summary. The time of filing the notice of lien is shortened from 6 months to 120 days, and the time of the institution of suit from 6 months after the filing of the notice to 180 days after the last furnishing of labor or materials. The operative language of the lien is given statutory definition. Lien circuity problems are eliminated by having the priority determined by the date upon which the lien claimant first furnished labor or materials. A statutory notice of lien form is provided and the requirement for itemization in detail has been abrogated.

4. Detailed Comment on Proposed Legislation.

G. S. 44A-7. Definitions. The definitions have no statutory background. The word "improve" is used in place of the language "built", "rebuilt", "repaired" or "improved" contained in G.S. 44-1.

Section 44A-8. Mechanics, laborers' and materialmen's liens; persons entitled to lien. This is the operative language giving rise to the lien. The lien is founded upon a debt arising from a contract. It is substantially the same as the language contained in G.S. 44-1. Numerous court decisions have pointed out that the lien is purely statutory in origin and these cases have found support and the language "upon complying with the provisions of this article".

Section 44A-9. Extent of lien. The language of this section is designed to provide guidelines for the court in determining the amount of land to which the lien attaches. G. S. 44-1 simply provides that the "necessary lot" is the subject of the lien. Several states have limitations on the amount of land that can be subject to any one lien. Limitations of this nature were considered by the drafting committee but specifically rejected in favor of no fixed requirement.

Section 44A-10. Effective date of lien. This provision codifies the doctrine of relation back that was described by the court in Equitable Life Assurance Society vs. Basnight, 234 N.C. 347, 67 S.E.2d 390 (1951). The priority of the lien is established with reference to this section, not only as to other encumbrances of record, but also as to other prospective lien claimants. The result follows from the language of this section (44A-10) when compared with 44A-14 (a) which in part reads as follows: "The sale of real property to satisfy a lien granted by this article shall pass all title and interest of the owner to the purchaser, good against all claims or interests recorded, filed or arising after the first furnishing of labor or materials at the sight of the improvement by the person claiming a lien." A definite change in the priority under existing law is effected by the combination of these two provisions.

Section 44A-11. Perfecting liens. The language in this section leans on the terminology used by Uniform Commercial Code with regard to the perfection of a security interest. It is to be observed that there are two concepts involved in the lien: perfection and enforcement. Perfection comes through filing and enforcement by the institution of an action. Unlike some cases under the Uniform Commercial Code, "perfection" has no relationship to priority.

Section 44A-12. Filing Claim of Lien. (a) This subsection incorporates several features inherent but not necessarily explicit in prior law. The claim must be filed in the office of the Clerk of Superior Court in each County where the real property subject to the claim of lien is located vice "in any County where the labor has been performed or materials furnished". The Clerk is required to record the claim of lien on the judgment docket and index the same under the name of the record owner of the real property at the time the claim of lien is filed - which would remove any doubt as to the proper place of filing of the lien within the Clerk's office.

This section also adds the provision for the filing of a claim of lien with the receiver, referee in bankruptcy, or assignee for the benefit of creditors who obtains legal authority over the real property which eliminates the necessity for further reference to the public records in such instances. Prior law permitted the filing of a claim with a receiver without the necessity of bringing action but implicitly required the notice of lien to be filed with the Clerk of Superior Court. Prior law also left some doubt as to the effect of filing a claim with the referee in bankruptcy who, technically speaking, is not a "receiver." Though the language in 44A-12(a) is permissive with regard to filing a claim with a receiver referee in bankruptcy or assignee, the second sentence of 44A-13(a) establishes that where the title to the real property against which the lien is asserted is by law vested in a receiver or trustee in bankruptcy, the lien shall be enforced in accordance with the orders of the court having jurisdiction over the real property.

Section 44A-12(b). Several changes of prior law are effected by this subsection. The time for the filing of claim of lien has been shortened to 120 days after the last furnishing of labor or materials at the sight of the improvement by the person claiming the lien. Additionally, the obligation secured by the lien must be matured at the time of filing. It was the opinion of the drafting committee that since the priority of the lien was determined with reference to the date of first furnishing of labor or materials at the sight of the improvement by the person claiming the lien, premature filing would be unnecessary. A period of 120 days was thought to be a reasonable time within which to assert the lien or have the same barred. It was further the opinion of the committee that an extension of credit beyond the period of 120 days should result in the waiver of the lien; no hardships would necessarily be reached in such instances because a lien claimant could adequately protect himself with a suitable security instrument such as a deed of trust.

Section 44A-12(c). This subsection prescribes a statutory form of lien which, if utilized, results in the filing of an effective claim of lien. The statutory form is designed to list the essentials necessary for determination of priority of liens. A significant change in the requirements of G.S. 44-38 is contained by the language in the statute at the end of the statutory form "a general description of

the labor performed or materials furnished is sufficient." It is not necessary for a lien claimant to file an itemized list of materials or a detailed statement of labor performed." It was the opinion of the drafting committee that in many instances the requirement for itemization imposes an unreasonable burden upon the lien claimant and a dispute as to what was furnished is largely a matter of proof to the satisfaction of the trier of fact.

Section 44A-12(d). Prior case law in effect contained provisions similar to those in subsection (d). The necessity for amendment of a claim of lien is thought to be greatly reduced by virtue of this statutory form. Since no amendment is permitted, the question of whether or not an amendment is material will not arise. A new claim of lien can be filed where a mistake has been made in the first one.

Section 44A-12(e). This subsection furnishes a statutory standard for assignment of a claim of lien. Frequently claims of lien are assigned by a laborer or materialmen to his creditor. This subsection defines the procedure to be observed so that the assignee of a claim will be protected through a marginal entry.

Section 44A-13. Action to Enforce the Lien. (a) The time for the institution of an action to enforce the lien is shortened to 180 days after the last furnishing of labor and materials at the sight of the improvement by the person claiming the lien. Prior law permitted the claimant 6 months after filing the notice of lien within which to institute an action. It is important to observe the change in measuring points from the time of filing to the time of last furnishing labor or materials. It is also important to note that the time has been changed from 6 months to 180 days. Implicit in the new statutory provisions is permission for the institution of only one action to enforce the lien where land lies in more than one County and is subject to the same lien; in such instances, it is thought to be proper for a notice of the action to be filed in the County in which the claim of lien has been filed, but no action has been instituted. The court in which the action should be instituted would depend upon the jurisdictional requirements. There is no restriction for institution in the Superior Court and where title to the property is by law vested in the receiver or trustee in bankruptcy, an action would be improper and the lien should be enforced in accordance with the orders of the court having jurisdiction over the real property. In such instances, the court having jurisdiction over the

property normally determines the priority of claims against the property and statutory support for this procedure is provided.

Section 44A-13(b). The amount of the judgment enforcing the lien cannot exceed that stated in claim of lien enforced thereby. Implicit in this subsection is the absence of any requirement that the exact amount of the lien be shown in the claim of lien but only the maximum amount claimed need be shown. This subsection also requires that the judgment direct a sale of the real property subject to the lien thereby enforced. A present custom is to require such recital in judgments. G.S. 44-46 is repealed and a lien claimant may, having obtained his judgment, execute on other property of the judgment debtor without first resorting to the property subject to the lien.

Section 44A-14. The sale of property and satisfaction of judgment enforcing lien or upon orders prior to judgment; distribution of proceeds. -(a) Execution sales; effective sale. This subsection provides as a normal course of events that the sale shall be held as an execution sale. It further provides that the sale to satisfy the lien granted by the article shall pass all title and interest of the owner to the purchaser good against all claims or interests recorded, filed or arising after the first furnishing of labor or material to the sight of the improvement by the person claiming the lien. The doctrine of relation back is clearly recognized in this subsection.

Section 44A-14(b). Sale of property upon order prior to judgment. This subsection permits the property subject to the lien to be sold prior to a trial on the merits of the lien claimed where the designated judge, upon notice and hearing, finds that a sale prior to judgement is necessary to prevent substantial waste, destruction, depreciation or other damage to the real property. The judge is given wide latitude in determining the type of sale. An extraordinary remedy is provided by this subsection for use in special instances enumerated in the subsection. It was the opinion of the drafting committee that the courts would normally have the authority to grant relief consisting of a sale of the type set forth in the subsection; but, in light of case law development, special statutory authority was deemed proper.

Section 44A-15. Attachment available to lien claimant. This section is substantially the same as G. S. 44-44. It is to be noted that the lien claimant need not allege fraud under either the proposed or prior law but merely that the owner is removing or attempting to remove or threatens to remove an improvement from real property without the permission of the lien claimant.

Section 44A-16. Discharge of record lien. This section is substantially the same as section 44-48.

Section 44A-17. Each spouse agent for other for entirety property. This section is specifically designed to change case law which has required both spouses to join in the contract for the improvement of the entirety property. Objective standards for subjecting entirety property to the lien upon the contract of one spouse are provided this section. If the man and woman are living together as man and wife, a dissenting spouse must object in writing to the lien claimant within 10 days from the first furnishing of labor or materials in the furtherance of the contract for the improvement of entirety property. This section does not provide for an impersona judgment against the spouse who has not contracted with the lien claimant, but it merely provides that the property improved will be subject to the lien. This section will prevent a spouse from sitting on his or her rights and enjoying an improvement made by an unsuspecting lien claimant.

Sections 2 and 3 of the Bill amend G.S. 44-6 and 44-9 relating to subcontractors so as to conform with the new provisions for contractors dealing directly with an owner.

Section 4 of the Bill contains the repealer. A summary of each section follows:

(a) G.S. 44-1 which is statutory language granting the lien of the laborer and materialman is replaced by G.S. 44A-7 and 44A-9.

(b) G.S. 44-39 which required the filing of a notice of lien within 6 months has been replaced by G.S. 44A-12(b).

(c) G.S. 44-40 providing the date of filing fixes priority is replaced by G.S. 44A-10 providing that the lien relates to and takes effect from the time of first furnishing of labor or materials at the sight of the improvement by the person claiming the lien.

(d) G.S. 44-41 relating to the laborers crop lien is repealed - there being no other reference in the statutes with regard to the laborers lien for crops. It was the sense of the drafting committee that social and economic conditions have undergone substantial change since this provision was enacted and adequate remedies presently exist for such persons.

(e) G.S. 44-42, claims of prior creditors, is deleted since there is no longer any possibility of more than one place for the filing of a claim of lien. Prior law made it possible for the claims to be filed in some instances before the justice of the peace and others with the Clerk of Superior Court.

(f) G.S. 44-43 requiring the commencement of an action to enforce the lien within 6 months of the filing of the notice of the lien is replaced by 44A-13(a) requiring the action to be instituted within 180 days after the last furnishing of labor and materials at the sight of the improvement by the person claiming the lien.

(g) G.S. 44-44 providing the remedy of attachment to a lien claimant has been retained in G.S. 44A-15 with only changes in grammar.

(h) G.S. 44-45 permitting the defendant in the suit to enforce the lien to plead a set-off or counterclaim is supplanted by the statutes relative to pleadings and the conduct of civil actions in general.

(i) G.S. 44-46 relative to execution has been replaced by G.S. 44A-14 and G.S. 44A-13.

MEMORANDUM

SUBJECT: A BILL TO AMEND SEVERAL MISCELLANEOUS SECTIONS OF THE GENERAL STATUTES TO CONFORM THE LANGUAGE TO THE UNIFORM COMMERCIAL CODE (GSC 259).

FROM Sidney S. Eagles, Jr., Revisor of Statutes

The General Statutes Commission, after study and discussion, has concluded that throughout the General Statutes, wherever possible, the statutorily defined terminology of the Uniform Commercial Code should be substituted for pre-code language.

The most common substitutions called for are "security interest" for "lien", "security agreement" for "chattel mortgage", and "secured party" for "lienor". In some cases the Uniform Commercial Code terminology is utilized as alternative language in addition to present statutory language.

The General Assembly in 1967 attempted to eliminate certain references to conditional sales contracts in deference to the Uniform Commercial Code. The instances corrected in this bill were evidently overlooked in 1967.

This Act is part of our continuing effort to accomplish an orderly transition to the Uniform Commercial Code.

No change in the substantive law is intended by these amendments. They are intended to simply effect a change in nomenclature.

This bill has been tendered to the North Carolina Bar Association Subcommittee on the Uniform Commercial Code for their review in keeping with the General Statutes Commission's policy of submitting all Uniform Commercial Code-related legislation to them.

The General Statutes Commission recommends this bill and urges its enactment.

C-984
(1969)

MEMORANDUM *SB 793*

SUBJECT: A BILL TO BE ENTITLED AN ACT TO AMEND SEVERAL MISCELLANEOUS SECTIONS OF THE GENERAL STATUTES TO CONFORM THE LANGUAGE TO THE UNIFORM COMMERCIAL CODE. (GSC 259).

The General Statutes Commission has received suggestions from its members and others for changes in certain sections dealing with liens on personal property and conditional sales agreements. The Commission agreed that these changes in language should be made wherever it was possible to change the phraseology without changing the substance of the law. The changes in Sections 1-3 of this bill are recommended for enactment.

Section 1. The change made here to G. S. 45-21.12 finishes the changes begun in 1967 by Session Laws 1967, c. 562,S. 2 which eliminated some of the references to conditional sales contracts from the statute. This section eliminates the remaining references from Subsection (b).

Sec. 2 and 3. The changes made here to G. S. 14-114 and 14-115 are simple substitutions of Uniform Commercial Code Terminology, "secured party", "security agreement", and "security interest" for the terms "lien" and "lienor". No change in the substantive law is contemplated.